Bulankulama and six others v. Ministry of Industrial Development and seven others

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In The Supreme Court Of The Democratic Socialist Republic of Sri Lanka

S.C. Application No 884/99 (F.R)

In the matter of an Application Under Article 17 read with Articles 126 of the Constitution

1. Tikiri Banda Bulankulama
No. 05, Kandakkulama,
Kiralogama.

2. Rarnayake Mudiyanselage Ranmenike, Palugaswewa,
Eppawela.

3. Palitha Nissanka Bandara,
Palugaswewa,
Eppawela.

4. Dissanayake Kiribandalage Ranbanda,
Palugaswewa,
Eppawela.

5. Palihawadana Arachchige Kiribanda,
Palugaswewa,
Eppawela.

6. Dissanayake Ukkubandage Seneviratne,
"Polwatta",
Ihala Siyambalawewa,
Eppawela.

7. Ven Mahamankadawala Piyaratna Thero,
Galkanda Purana Viharaya,
Wppawela.

Petitioners

1. The Secretary,
Ministry of Industrial Development,
No. 73/1, Galle Road,
Colombo 03.

2. Board of Investment of Sri Lanka,
World Trade Centre,
West tower Echelon Square,
Colombo 01.

3. Geological Survey and Mines Bureau,
04, Senanayake Building,
Dehiwela.

4. Central Environmental Authority,
Parisara Mawatha ,
Maligawatte New town,
Colombo 10.

5. Sarabumi Resources (Pvt.) Ltd
41, Janadipathi Mawatha,
Colombo 01.

6. Lanka Phosphate Limited,
No. 63, Elvitigala Mawatha,
Colombo 05.

7. Geo-Resources Lanka (Pvt.) Limited.
No. 09, Abdul Gaffoor Mawatha,
Colombo 03.

8. The Attorney-General,
Attorney-General's Department,
Hulftsdorp,
Colombo 12.

Respondents

BEFORE — Amarasinghe, J
Wadugodapitiya, J
Gunesekara, J

COUNSEL — R.K.W. Goonesekara with Ruana Rajepakse and Asha Dhanasiri for the Petitioners
K. Sripavan D.S.G. with B.J. Tilakaratne, SSC and Anusha Navaratne, S.C. for the 1st to 3rd, 6th and 8th Respondents.

Chulani Panditharatne for the 4th Respondents

Romesh de Silva, P.C., with Harsha Amarasekara and Sarath Caldera for the 5th and 7th Respondents.

ARGUED ON 15.03.2000
16.03.2000
28.03.2000 and
30.03.2000

FINAL WRITTEN SUBMISSIONS 7th April 2000
DECIDED ON 2nd June 2000

AMERASINGHE, J.,

THE BACKGROUND

After soild surveys conducted by a team of scientists at Kiruwalhena, which had been selected as a prototype site of dry zone, high elevation laterite, the team informed the Director of Geological Survey about some peculiar weathered rock they had found. Early, in 1971, during the Geological Survey of the Anuradhapura district, it was found that what had been supposed by the scientists during the soil surveys to be "high level fossil laterite" was really an igneous carbonate apatite. The Department of Geological Survey had thus come to "discover" a deposit of phosphate rock occuring in the form of the mineral apatite at Eppawela in the Anuradhapura district.

Haying regard to the policies of the Government at that time, it was decided in 1974 that the use of the Eppawela deposit should be entrusted to a Divisional Development Council. (D.D.C)

Although a trial order for the supply of 500 tons was placed by the Ministry of Industries and Scientific Affairs and the order was fulfilled within about four months, no further orders for phosphate rock were placed. The D.D.C. project was later taken over by Lanka Phosphate Ltd., a company fully owned by Government, which was set up by the Ministry of Industries.

In December 1992, a notice calling for proposals to establish a Joint Venture for the manufacture of Phosphate fertilizer using the apatite deposit at Eppawela was published in local and foreign newspapers. Six proposals were received . A committee appointed by the Cabinet, after the having considered an evaluation report decided with the approval of the Cabinet to undertake negotiations with Freeport MacMoran Resoiurce Partners of USA. (hereinafter referred to as Freeport MacMoran) One of the factors that appeared to have been in favour of freeport MacMoran was that it was "one of the leading phosphate fertilizer firms in the world". (P4 page 2) Another was that "IMCO Agrico (Sic.) and affiliate of M.S. freeport MacMoran, had done studies and worked on the utilization of this particular phosphate deposit several years ago and therefore, they had the benefit of that research." (p4 page 2)

The negotiation committee was assisted by representatives from various Government Departments and Ministries and by a team of experts.
The first round of negotiations was held from 17-22 March, 1994. Thereafter, when the present government took office, the Minister of Industrial Development, in a Memorandum dated the 28th

of January, 1995, reported to Cabinet the progress made and sought and obtained the approval of the Cabinet to continue with the negotiations. A second round of negotiations were held from 27-31 march, 1995. "Major issues" relating to the availability of land for a plant at Trincomalee, and "the resettlements and payment of compensation to Mahaweli settlers presently living in the exploration area identified for the project", were discussed with local institutions and authorities (p4)

On the 26th of September, 1996 the Minister of Industrial Development reported to Cabinet on the progress made and sought approval "for certain parameters in respect of some key issues which continued to remain unresolved." No information was furnished to court on what these issues were and what had been decided. We were merely informed that Cabinet approval was received on the 02nd of October, 1996 and that the third round of negotiations were held from December 21st, 1996. Thereafter, Freeport MacMoran submitted drafts of the Mineral Investment Agreement and other subsidiary agreements. These were studied by the negotiating committee and lawyers from the Department of the Attorney-General "on the basis of the parameters laid down by the Cabinet and the applicable laws." (p4) The Freeport MacMoran draft was returned to them with amendments. Freeport MacMoran then raised "several issues regarding the interpretation of the key parameters and also the language in the draft as amended by the Attorney-General's Department". (p4) Subsequently, freeport MacMoranm met Her Excellency the President whi thereupon directed Mr B.C. Perera (Secretary, to the Treasury), Hon Sarath N Silva, (Attorney-General), Mr. K.austin Perera (Secretary, Ministry of Industrial Development), Mr Thilan Wijesinghe (chairman/Director-General, Board of Investment of Sri Lanka), and Mr Vincent Panditha (Senior Advisor, Board of Investment of Sri Lanka and Consultant, Ministry of Industrial Development) (p4), "to conduct on final round of negotiations and clear any outstanding issues along with the texts of the Mineral Investment Agreement and subsidiary agreements". (p.4) The final round of negotiations was held from the 28th of July, 1997 to the 04th August 1997 and the final drafts of the Mineral Investment Agreement and subsidiary documents were agreed upon and initiated by the Secretary, Ministry of Industrial Development and the representatives of Freeport Mac Moran and IMC Agrico.

On the 17th of May 1998 the President of the National Academy of Sciences , Prof. V.K. Samaranayake wrote to the President of Sri Lanka (with copies to the Minister of Science Technology and Human Resource Development and the Minister of Industrial Development (p10) stating that the council of the Academy was of the view "that the proposed project in its present form as some of the vital data relating to the actual size and quality of the mineral deposit have not been adequately surveyed and established. This shortcoming had also been highlighted in the Report of May, 1996 of the Presidential Committee appointed by Your Excellency. The feasibility of the Project can be comprehensively appraised only when this vital data are available. Accordingly, we respectfully request Your Excellency to defer the grant of approval for the Project until a comprehensive appraisal is undertaken".

In the same letter, the President of the national Academy of Sciences stated that the Council had also examined other related issues and that the recommendations, including options, were elaborated in the report of the National Academy of Sciences which was forwarded to the President of Sri Lanka.

In a newspaper article entitled "Exploitation of Eppawela rock phosphate depost" , (p.10 (a) Prof. V.K.Samaranayake stated as follows

"the national Academy of Sciences is the highest multi-disciplinary scientific organisation in Sri Lanka. Its mandate includes, "to take cognizance and report on issues in which scientific and technological considerations are paramount to the national interest" and "too advise on the management and rational utilization of the natural resources of the island so as to ensure optimal productivity, consistent with continued use of the biosphere on a long term basis taking into account the repercussions of using a particular resource on other resources and the environment as a whole and to help in making use of resources of the country in national development".

Prof. Samaranayake went on to say that,

"Accordingly, the Academy studied the proposal from all angles and submitted its report to Her Excellency the President in May 1998. The project proposal was examined in relation to (a) the deposit and proposed rate of exploitation; (b) proposal to manufacture fertilizer locally; (c) environmental considerations; and (d) economic and social considerations".

On the 23rd of July, 1999 a committee of twelve scientists of the National Science Foundation submitted a report under the title "The Optimal use of Eppawela rock phosphate in Sri Lankan agriculture" (p12) Having observed that the proposal of the U.S. Mining company "in the view of many of the Professional Associations in the country. E.g. the Institution of Engineers, Institute of Chemistry, National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts", the committee examined various proposals made and suggested options which in its view "are more advantageous to the country".

On the 8th of October, 199 the seven Petitioners filed an application in this court under Article 17 read 126 of the constitution. The court (Fernando, Wadugodapitiya and Gunesekara, JJ.) on the 27th of October 1999 granted the seven petitioners leave to proceed with their application for declarations and relief arising from the alleged infringement of their fundamental rights guaranteed by Articles 12 (1), 14(1) (g), and 14 (1) (h) of the Constitution.

JURISDICTION

In the proposed agreement, it is acknowledged in the "Introduction" that "The mineral resources contained in the territories of Sri Lanka constitute a part of the national wealth of Sri Lanka.

Learned counsel for the 5th and 7th respondents with whom, the Deputy Solicitor-General associated himself, submitted that the Government, and not this court, is the "trustee" of the natural resources of Sri Lanka. "thus , as long as the Government acts correctly the court will not put itself I the shoes of the Government. That is to say the court may or may not agree with the final outcome. However, if the Government has correctly acted as trustee the court will not interfere". It was further submitted that the petitions should be dismissed ***in limine***, since the petitions had invoked

the fundamental rights jurisdiction of the court in a matter that was "either a public interest litigation or breach of trust litigation".

I am unable to accept those submissions

The Constitution declares that sovereignty is in the people and is inalienable. (Article 3) Being a representative democracy, the powers of te people are exercised through persons who are for the time being entrusted with certain functions. The constitutions states that the legislative power of the people shall be exercised by Parliament, the executive power oif the People shall be exercised by the President of Sri Lanka and the judicial power of the people shall be exercised, *inter ala,* through the courts created and established by the constitution. Article 4) Although learned counsel for the petitioners., citing *M.C. Mehta v. Kamal Natha* (1977) ISCC 388 agreed with learned counsel for the 5th and 7th respondents that the natural resources of the people were held in "trust" for them by the Government, he did not subscribe to the view that the court had no role to play. In any even, he challenged the respondents claim that the government had in fact acted "properly" in discharging it role as "trustee".

The organs os 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, which the *Mahavamsa,* 68.8-13 sets forth in the following words.

"Having thus reflected, the king thus addressed his officers.

In my Kingdom are many paddy fields cultivated by means of rain water, but few indeed are those which are cultivated by perennial streams and great tanks.

By rocks, and by many thick forests, by grate marshes is the land covered.

In such a country, let not even a small quantity of water obtained by rain, go to the sea, without benefitting man.

Paddy fields should be formed in every place, excluding those only that produce gems, gold, and other precious things.

It does not become persons in our situation to live enjoying our own ease, and unmindful of the people ….. ".

Translation by Mudaliyar L. de Zoysa, Journal of the Royal Asiatice Society (C.B) , vol. III No IX, (The emphasis is mine)

In the case concerning the Gabcikovo-Nagimaros project (Hungary/Slovakia) - the Danube case – 1997 General List no 92, 25 September, 1997 before the International court of Justice, the Vice-

president of the Court, Judge C.G. Weeramantry, referred at length to the ancient irrigation works of Sri Lanka which, he said "embodied the concept of development par excellence". He said:

"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 veasts 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 a;; ;living beings; thou art only the guardian of it …." The juxtaposition in thjis heritage of the concepts of developments and environmental protection invites comment immediately from these familiar with it. Anyone interested in the human futures would receive 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. This 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 guardians – not its owners. " The task of the law is to convert such wisdom into practical terms…."

I have not been able to find the sermon referred to. However, Tissa, who depended on the support of Emperor Asoka, and even added to his name the title of his patron, "Devanampiya", would have had little or no hesitation in accepting the advice of Asoka's emissary, Mahinda. The subject of land tenure in Sri Lanka, including the status, claims, and rights of the Monrach with regard to the soil, is an extremely complex one as, for instance, the debates on various matters between H.W. Codarington and Julius de Lanerolle showed. (see Journal of the Royal Asiatic society (Ceylon Branch), Vol. XXXIV, p, 199 s.q. p. 226 sq.) For the present limited purpose, what I do wish to point out is that there is justification in looking at the concept of tenture, not as a thing in itself, but rather a way of thinking about rights and usages about land. H.W. Codrington, Ancient Land Tenure and Revenue on Ceylon, pp. 5-6 refers to the fact that the King was *bhuatpi* or *bhupala* "lor of the earth", "protector of the earth" – "Lord *adhipathi* of the fields if all' . He quotes Moreland wrote as follows. "Traditionally there were two parties, and only two, to be taken into account; these parties were the ruler and the subject, and if a subject occupied land, he was required to pay a share of its gross produce to the ruler in return for the protection he was entitled to receive. It will be observed that under this system the question of ownership of land does not arise; the system is in fact antecedent to that process of disentangling the conception of private right from political allegiance which has made so much progress during the last century, but is not even now fully accomplished ….. " Later, grantees, in general, it seems were given the enjoyment of lands for services rendered on to be rendered in consideration of their holdings, or lands were given for pious and public purposes unrelated to any return. For their part grantees were under and obligation to make proper use of the lands consistent with the grant or, in default, suffer their loss or incur penalties.

The public trust doctrine, relied upon by learned counsel on both sides, since the decision in *Illionis Central R. Co. V. Illinois,* 146U.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 anscestors did, and our contemporaries do, recognizing a shared responsibility.

The Constitution today recognizes duties both on the part of 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 rights and freedoms (such as the 5th and 7th respondents claimed in learned counsel's submissions of their behalf to protection under Article 12 of the Constitution relating to equal protection of the law). Is inseparable from the performance of duties and obligations, and accordingly it is the duty every person is Sri Lanka to protect nature and conserve its riches".

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 resources has nor 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.

In any event, the issue before me is not the question whether this court or the "Government" is a "trustee", and whether there has been a breach of trust, but whether in the circumstances of the instant case the rights of the Petitioners guaranteed by Articles 12(1), 14(1) (g) and 14(1) (h) of the Constitution have been violated. And in that regard the jurisdiction of this Court is put beyond any doubt by Article 126(1) of the Constitution which states, among other things, that 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 …." The court 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.

Learned counsel for the 5th and 7th respondents submitted that, being an alleged "public interest litigation" matter, it should not be entertained under provisions of the constitution and should be rejected. I must confess surprise, for the question of "public interest litigation" really involves questions of *Standing* and whether there is a certain kind of recognized *cause* of action. The court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners, as individual citizens, have a constitutional right given by Article 17 read with Article 12 and 14 and Article 126 to be before this court. 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 Lanka, becomes relevant.

MAY THE SEVEN PETITIOENRS JOIN IN A SINGLE APPLICATION?

Learned counsel for the 5th and 7th respondents submitted that "several petitioners cannot join in one application in terms of Article 126 of the Constitution". Admittedly, Article 126(2) refers to "any person", "such person" and "he may himself". However, the court has not construed these phrases so as to preclude the joining of several petitioners where their individual rights are based on the same alleged circumstances; in fact , the practice of the court points in the other directions. I therefore hold that the petitioners are not non-suited on the ground of misjoinder.

IS THE APPLICATION OUT OF TIME?

The respondents submitted that the application must be rejected, since it has been made out of time. However, no indication was given by the respondents of the date from which the period of one month specified by Article 126(2) is to be reckoned. The respondents at the same time maintain that there can be no complaint of an infringement or imminent infringement of rights :unless and until the Development Pant is in place", for it is that document which would show what rights, if any, have been or are about to be infringed. If there has been no infringement or imminent infringement it seems to me that the respondents are entitled to call for the dismissal of the petition on the ground that the petitioners have failed to establish their case. It cannot, however, be maintained that the petition is too late, unless it is conceded that the case was ripe or mature for hearing. The petition cannot be premature and too late at the same time, for the latter position assumes that although the matter was ripe or mature for consideration, the petitioner failed to act within the prescribed time. A substantial part of the respondents' case was based on the submission that the petitioners' case was based on the submission that the petitioners' case was premature and "conjectural". I shall deal with the respondents' submissions in that regard later on. But for the present, in dealing with the threshold question of whether the petition is out of time, what I have already stated and what I shall state in the next paragraph, should, I think, be sufficient to meet the submission of the respondents.

I addition to pointing out the inconsistent positions of the respondents on the question under consideration, namely, whether the petition was out of time, the petitioners explained that there was considerable uncertainty about the status of the project in question, with "inconsistent signals" being given by the Government from time to time on that matter, both in response to public protests, and critical observations from scientists, including those of the National Science Foundation in their report to the Minister of Science and Technology in July 1999. The Minister had asked the National Science Foundation for advice, and having regard to the observations made by the Foundation, it was not unreasonably expected that the Government would not proceed with the project. There was such uncertainty about the matter, that it might have been premature for the petitioners to come into court earlier. However, when a newspaper report (Document p13) dated the 26th of September 199, announced that the proposed agreement relating to the project, which had been initialed in 1997, following negotiations that had gone on since 1994, was expected to be

signed within two months, the petitioners filed their petition on 08 October, 1999. The impending or threatening danger of the violation of the petitioners' rights reached a sufficient fullness on the 26th of September, 1994.

In the circumstances, I hold that the application was filed in time within the meaning of Article 126 (2) of the constitution.

LEAVE TO PROCEED WAS FOR INFRINGEMENT NOT FOR IMMINENT INFRINGEMENT
The petitioners were granted leave to proceed for the alleged *infringement* of Articles 12(1), 14(1) (g) and 14(1) (h) and not for the alleged imminent infringement of their rights. The fact that leave to proceed was granted for "infringement" dies not preclude the court from considering whether there was an *imminent infringement* for *omne mejus* continet in se minus – the greater contains the less. This court, having granted leave to proceed for the alleged infringement of a fundamental right, and thereby being empowered by the constitution to do the more important act of considering whether an infringement had taken place, cannot be debarred from doing the less important thing of considering whether there is an imminent infringement, for non *debet cui plus licet quod* minus est non licere or and it is sometimes expressed, *cui licet quod majus no debet . quod minus est non licere* – a doctrine founded on common sense, and of general application.
THE ALLEGED IMMINENT VIOLATION OF ARTICLES 14(1) (g) AND 14(1) (h) OF THE CONSTITUTION

Article 14(1) (g) of the constitution states that every citizen is entitled to the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise. Article 14(1) (h) states that every citizen is entitled to the freedom of movement and of choosing his residence within Sri Lanka. The petitioners are citizens of Sri Lanka and residents of the area called Eppawela in the Anuradhapura District in the North Central Province. The first to fifth petitioners are land owners and/or paddy and dairy farmers in the Eppawela area. The sixth petitioner is a teacher and the owner of an extent of coconut land in the Eppawela area. The first to sixth petitioners state that they are in danger of losing the whole or some portion of their lands and their means of livelihood if the proposed mining project is implemented. The seventh petitioner is the Viharadhipathi of the Galkanda Purana Viharaya where he has resided for over 35 years. He states that the Viharaya and the paddy lands that sustain it are in danger of being destroyed if the proposed mining project is implemented. The petitioners complain of an imminent infringement of their fundamental rights guaranteed by Articles 14(1) (g) and 14(1) (h).

THE AREA AFFECTED

The Petitioners' state that the initial exploration are will be 56 square kilometers with a ten kilometer buffer zone on each side, bringing to about 800 square kilometers the area potentially affected. They state that about 2,600 families or 12,000 persons, including themselves, are likely to be permanently displaced from their homes and lands.

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 member of the *citizenry* of Sri Lanka.

The negotiating Committee appointed by the President states in its report to the president (p4 at p.5) that "the exploration area will cover approximately 56 sq. miles (sic.) of land situated in Eppawela in the Anuradhapura District". And that the Buffer Zone Area "will comprise of a land area extending to 10 kilometers from the boundaries of the exploration area". That is a misleading statement, for in terms of the Agreement the "exploration are", is far in excess of 56 sq. miles. Indeed, as we shall see, the President's committee accepts the fact that the exploration area was not absolutely limited to 56 sq. miles: It was contractually elastic and extendable.

I agree with learned counsel for the respondents that there is an yet no "Agreement" *Stricto sensu* Article 2.1 of the proposed Mineral Investment Agreement, sometimes hereinafter referred to for the sake of convenience as the "Agreement" describing the "basic" rights of the company, states, *inter alia* as follows: "without limitation on the other rights conferred on the company by this Agreement, the Company shall have, and the Government hereby grants to the company, subject to the other terms and conditions specified in this Agreement, the sole and exclusive right (a) to search for and explore for phosphate and other minerals in the Exploration Area …. (b) to conduct pilot or test operations as appropriate at any location within the contract Area (without limiting the company's option of conducting such pilot r test operations entirely or partially at other locations): (c) to develop and mine under Mining Licences any phosphate deposit (including phosphate minerals and Associated Minerals) found in the Exploration Area …."

Article 1 of the Agreement defines "Exploration Area" as "that certain area of land which forms part of the contract Area and which initially covers approximately 56 sq. kms. Of land and is set forth and described as the Exploration Area on Annexes. "B-1"and "C-1" hereto in respect of which Exploration Licences have been issued under the Act to Lanka Phosphate and/or Geo Resources Lanka (Pvt.) Ltd as such area may be reduced or extended as specifically provided for in this Agreement." "Exploration" is defined in the Agreement as "the search for apatite and other phosphate minerals using geological, geophysical and geo-chemical methods and by bore holes, test pits, trenches, surface or underground headings, drifts or tunnels in order to locate the presence of economic apatite or other phosphate mineral deposits and to find out their nature, shape and grade,, and this term includes "Advanced Exploration" in terms of the Mining (Licensing) Regulations. No. 1 of 1993. The verb "explore" has a corresponding meaning.

The various activities falling within the definition of "Exploration" is, in terms of the Agreement, not confined to an area of 56 sq. kms. That, in terms of the definition, is the area covered "initially", but one that may be "extended as specifically provided for in this Agreement". It is stated in Article2.1 of the Agreement to be a "basic right" of the Company "to conduct pilot or test operations as appropriate *at any location within the contract Area without limiting the company's option within the contract Area test operations entirely or partially at other locations".* So, Exploration may extend to the Contract Area. The Agreement defines "Contract Area" to mean "the lands included within the Exploration Area and the processing Area as included within the Exploration Area and the Processing Area as described in Annexes "B-1" and "B-2" hereto and depicted on the maps set forth as Annexes "C-1" and "C-2" hereto, within which the activities of the enterprises are to take place, as from time to time reduced or extended in accordance with this

Agreement." "Processing Area" is defined in the Agreement to mean "that certain area of land which dorms part of the Contract Area and which is set forth and described as the Processing Area on annexes "B-2" and "C-2" hereto , as such area may be amended, revised or replaced on accordance with the provisions of this Agreement, which area may be used for Processing, shipping, docking, terminalling, storage, stockpiling and all other related activities and operations". "Processing" is defined in the Agreement as "the crushing, benefication, concentration or other treatment of phosphate minerals and Associated Minerals by physical, chemical, or other process in connection with the manufacture of products but does not include the smeltinh and refining of metals. The verb "process" has a corresponding meaning.".

Thus, in terms of the Agreement, the activities falling within the definition of "Exploration", may take place, not only within the 56 sq. kms., not only within the "Exploration Area", but also within the "Processing Area" which even includes Trincomalee. In fact, the report of the President's Committee states at p.6 that the "Processing Area will be Trincomalee where the processing plant, ware-house, dock, terminal and shipping are located".

It might be noted that in terms of Article 2.5, if the Processing Area identified at the time of the signing of the Agreement was found to be unsuitable after the feasibility study, the Government pledges to use "its best efforts" to locate other lands that ate suitable.

Article 2.4 of the Mineral Investment Agreement states as following

"Notwithstanding the existence of this Agreement and the fact that the company will control a significant area of land for the exploration for and possible development of phosphate mineral deposits as a result of this Agreement, the company shall remain eligible to apply for and obtain Exploration and Mining Licences on lands outside the Exploration Area…. In the event the Company does obtain Exploration and /or Mining Licences … covering lands within the Buffer Area such lands shall be added to the Exploration Area and treated in all respects as part of the Exploration Area and (and Mining Area, if a Development Plan is approved) and as licences which are subject to the provisions of this Agreement.

The report by the President's Committee states: "The company will have a right to extend their activities into the buffer zone as well, if found necessary." There is no definition in the Agreement of "Buffer Zone", however, the report of the President's Committee states at p6 that "Buffer Zone Area" will comprise a land area extending to 10 kilometers from the boundaries of the exploration area. The Company will have a right to extend their exploration activities into the buffer zone as well, if found necessary." Indeed, (1) since the "Exploration Area" in terms of the Agreement, as we have seen, extends to the "Processing Area", and (2) since in terms of Article 2.1 of the Agreement it is acknowledged that the Company shall have the "basic" right not only to conduct pilot or test operations at any location within the Contract Area but without limiting the Company's option of conducting such pilot or test operations entirely or partially at other locations", the area of operation even at the "Exploration" stage is very vast indeed and extendable, in terms of the Agreement, in "the Company's option." Reference is made to the reduction or extension of exploration or Processing Areas, however, reduction in terms of Article 6.3 is a matter for the *Company* to decide. The Government has no say in the matter. Regardless of maps demarcating the "Exploration" wide and practically unrestricted. No exploration may be contemplated in any

area outside the areas demarcated in the maps, but the terms of the agreement made "Exploration Area" at least an arguable mater. If the proposed agreement is signed, it would leave the resolution of a dispute on that matter to be settled by arbitration in terms of Article xx of the Agreement.

SETTLERS AND THE AFFECTED AREA

In their final written submissions on behalf of the 1st-3rd, 6th and 8th respondents, made after the oral hearing, learned counsel submitted that "During the exploration period the inhabitants of the area will not be displaced nor their lands will be affected". A map (Document X), prepared by the Director of the Geological Survey and Mines Bureau was annexed to the submissions under the caption. "The area reserved for mineral explorations up to (the) 31st July, 1999. "The map is a map of Sri Lanka showing three areas of demarcation:

"1 the area of 56 sq. km reserved for the proposed phosphate project;
2 areas reserved present for mineral explorations (8514 sq.km)
3 The areas where detail explorations have been carried out during the past three years (1839 sq.km). Neither any complaints or damage to the environment have been received nor any person has been displaced due to exploration activities ". (The emphasis is mine)

That map was not produced until after the conclusion of the oral submissions. When and why was it prepared? On the basis of Document X, the Deputy Solicitor-General said: "One could see from 'X' that the whole of Chillaw town has been part of the exploration area (sic). Therefore, it is respectfully submitted that no harm will occur either to the inhabitants of the area or to the environment during the exploration period. In the circumstances, it is respectfully urged that the application of the petitioner at this moment is pre-mature".

What is the fate of Chillaw and other areas referred to in document X? Was the agenda of the Geological Survey and Mines Bureau made known to the people of the affected areas? The Deputy Solicitor-General has not stated that the people of the areas demarcated in Document X have been made aware of the intentions of the Geological Survey and Mines Bureau, and, in the circumstances, his submissions that he people living within the proposed exploration areas in document X have made no protests, and that therefore the petitioners cannot object to exploration is unsound, for they are not comparable situations. Ha it been publicly announced that exploration, as defined in the proposed agreement, will be carried out in chillaw and other areas shown in Document X?

In his affidavit, the 1st respondent states, 4. (a) "The apatite deposits were discovered in 1971 and part of the deposit is to the North of the Jaya Ganga, which consist of Crown lands (sic.) Only; (b) the area to the south of Jaya Ganga has been excluded from the Mahaweli settlement Scheme and reserved for the apatite/Phosphate Project in view of the said discovery in 1971. Accordingly there are no legal settlements in the area "This, as we shall see is flatly contradicted by Article 17.3 of the proposed agreement which I have quoted below. At the hearing, he produced a map through the Deputy Solicitor-General. With his affidavit he submitted a Plan of "the known deposit area" prepared by the Geological Survey Department and stated that the 7th petitioner's temple wasnot within the known deposit area".

According to the map, there do not appear to be inhabitants on what is marked as the "known Deposit Area" south of what is marked as the "Kalawewa R.B. Main Channel", which the Deputy Solicitor General confirmed is the Jaya Ganga referred to by the 1st respondent. Learned counsel, for the 5th and 7th respondents and the Deputy Solicitor-General stated that no one was living on the reserve and that, therefore, on the known data, there will be no relocation.

However, the question as far as the 7th petitioner and the other petitioners are concerned is not whether their lands were on the "known deposit area", but whether they were within the "Exploration Area", including the area south of the Jaya Ganga. Having regard to the Grid map (p6 and 5 R2), the petitioners' lands are in the following squares and fall within the exploration area: 157332 (1st petitioner); 157329 (2nd petitioner); 157327/156329 (4th petitioner); 157329 (5th petitioner); 157327/158327 (6th petitioner); 157328 (7th Petitioner).

The 1st respondent suggested that, in view of the impending phosphate project, no settlers were located under the Mahaweli project in the area earmarked for the phosphate project. However, in the map furnished to us, there are "Mahaweli Settlers" within the demarcated "Exploration Area" south of what is marked as the "Kalawewa Main R.B. Channel". Indeed, the map it seems had been prepared for the very purpose of identifying Mahaweli Settlers , who are obviously not, as the 1st respondent suggested, illegal occupants of lands. The caption of the map is "Phosphate Project at Eppawela – Area falling within system 'H' of Mahaweli Project." Another map produced by the Deputy Solicitor-General – the "Buffer Area map" - grid map – shows another "Known Deposit" north of what is marked as the "Kalawewa main R.B Channel." When that map is read with the "Phosphate Project at Eppawela etc. Map", Mahaweli Settlers' appear to be living in that area as well.

Learned counsel for the 5th and 7th respondents submitted that "there are no persons living in the Exploration Area" , and that therefore there will be no need for relocation, and that no *viharayas*, homes or villages will be damaged. He stated that "As at present in terms of the known given reserves and inferred reserves no one at all will be relocated. Until the feasibility report is done there will be no way at all in finding out whether in terms of this project anybody will be relocated." The Deputy Solicitor-General stated that the application of the petitioners was "premature", for the deposits had not been commenced. It was only after the feasibility study that the persons affected and extend of environmental damage could be assessed.

From the point of view of imminent infringement as distinguished from infringement their submissions are not supported by the evidence provided by the maps submitted to us especially when read with the definition and flexible description of "exploration are" in the Agreement referred to above.

Learned counsel's submissions, as well as the assertions of the 1st respondent in his affidavit, are also at variance with the report of the President's committee. At pp. 3-4 oif that report, attention is drawn to the fact thta during the first round of negotiations conducted by the negotiating committee previously appointed by the Cabinet, one of the "major issues" that had to be discussed with "local institutions and authorities" related to the resettlement and payment of compensation of Mahaweli settlers presently living in the exploration area identified for the project". The President's

Committee notes that "Discussions have also been held with the Mahaweli Authority of Sri Lanka and willhelp to determine an exploration area which will least disturb the settlements. However, where re-settlement has to take place consequent to displacement, adequate compensation will be paid to the settlers and the costs will be met by the Joint Venture Company".

Article 17.3 of the proposed agreement acknowledgement both the fact that there are settlers south of the Jaya Ganga and the fact that they and other persons may be affected by mining operations. The Article shows not only that the petitioners and others may be affected but that if they are, the paramount consideration will be the interests of the company rather than those of the occupants of the affected areas.

17.3 "the Government and the Company acknowledge that if Mining is conducted within the portion of the Exploration Area , located south of the Mahaweli District Authority's main canal which flows through the Exploration Area, the occupants of such land ay be directly affected. Occupied areas are indicated on the map is attached hereto and made a part hereof as annex "K". To the extent that this area is included within the Mining Area and constitutes part of the area to be mined under the Company's Development Plan which is approved by the Government in accordance with the procedures set forth in Article VII, and the Company determines that it is necessary to relocate such occupants in order to accommodate Mining such area, then the company will pay the costs of such relocations and the *Government will use its best efforts to facilitate the relocation of any inhabitants of such land as requested by the Company in a manner which does not create an undue financial burden on the company or delay the Company's development and operation of the Mining Area. The Government will also use its best efforts to co-ordinate with the Mahaweli Authority and any other Government authority having jurisdiction over such lands in order to implement such relocations in an orderly and efficient manner, to minimize or eliminate the settlement within this area, and to cause the removal at minimal cost to the Company of squatters having no legal or possessory rights. In connection with the foregoing, the Government shall use all reasonable efforts to minimize or eliminate the settlement within this area of new inhabitants during the term of this Agreement.*

As to other parts of the Mining Area where the Company determines that "resettlement" is necessary, the Government and the Company acknowledge that only small numbers of persons inhabit such lands. As to these other lands where relocation is determined to be necessary by the Company, the same relocation provisions as set forth above will apply and the Government will utilize its best efforts to minimize or eliminate any settlement of persons or families on such other lands during the term of this Agreement.

In the event that the Company wishes to relocate persons in occupation or possession of private land and not within the scope of the relocation specifically provided for above in this section 17.3 such relocation shall be effected on terms to be agreed between the company and the owners of such private land".

(The emphasis is mine)

Apart from the Mahaweli settlers in the more recent villages established as part of the Mahaweli Development System 'H' project, there are residents of numerous ancient villages *(purana gam)*, both in the "Exploration Area" and the Buffer Zone . Admittedly, the scale of displacement will depend on the feasibility study. That does not mean that at the present time it can be confidently asserted, as learned counsel for the respondents did, that no relocation will take place, nor it can it be denied that some displacement is likely, - c conclusion, as we have seen, that understandably troubled the negotiating committee appointed by the Cabinet, although they seem to have been preoccupied with the fate of the Mahaweli settlers.

PETITIONERS' FEARS UNFOUNDED?

Learned counsel for the 5th and 7th respondents analysed the Agreement and said there were five stages in the project; (a) exploration; (b0 feasibility study; (c0 construction; 9d) operating; 9e) marketing. Mining, which could cause damage, he said, "is done only ar the operating stage". There was no need to feel any apprehension at the Exploration and Feasibility Study stages, which is what the signing of the proposed Agreement should lead to. It is only when the exploration and feasibility study are done, the approval of all the statutory authorities are obtained, and the Secretary accepts the feasibility report, that the company will be permitted to proceed to the construction and mining phases of the project. Exploration, he said, "only means search and location of the presence of economic apatite and other phosphate mineral deposits and to find out their nature and grade." The Deputy Solicitor-General expressed a similar view.

The exploration contemplated by the respondents may, perhaps, be of a non-intrusive nature. However, the definition of "exploration" in the proposed Agreement, as we have see,. Includes the search for certain minerals, and their location, nature and grade, *inter alia* by making "boreholes, test pits, trenches, surface or underground headings, drifts or tunnels." Mining may have comparatively more devastating consequences, but exploration can scarely be said to be so harmless as to cause the occupants of the exploration area no reasonable apprehension of imminent harm to their homes and lands. In the circumstances, the petitioners can hardly be blamed for not sharing the optimistic submission of learned counsel for the 5th and 7th respondents that exploration "can do no harm whatever to anyone".

The petitioners express concern not only about the harm that may be caused at the stage of exploration, but also at all stages of the project and by the total effect of the project as described in the proposed agreement. Admittedly, there is as yet no formally executed agreement. Yet, the document may have caused reasonable apprehension leading to the application of the petitioners, for (a) it has been initialed after a "final" round of negotiations between the parties to a proposed agreement; and (b) provides for each and every one of the "five stages" of the project referred to by learned counsel for the fifth and seventh respondents in his analysis of the Agreement. The petitioners' case is that, in the circumstances, the totality of the proposed agreement must be considered in deciding whether there is an imminent infringement of their constitutional rights.

There is nothing in the proposed agreement that supports the view that the signing if the proposed agreement will "only result in exploration and feasbility study". It is a comprehensive, all embracing document.

THE PROPOSED ACTIVITIES UNDER THE AGREEMENT

Following the exploration stage during which the company will locate the presence of economic apatite or other phosphate mineral deposits and find out their nature, shape and grade, a study would be made "to determine the feasibility of commercially developing the phosphate deposit or deposits identified by the Company". (Article 7.2) this is to be followed by the construction of "the mine, fertilizer processing plant and associated facilities". (Article 8.1) Article 9.4 states that "The Enterprise facilities shall include, among other things, the mine and related processing facilities, the fertilizer processing plant and associated facilities and may include port facilities, rail, road and pipeline transportation facilities, storage facilities, communication facilities, power supply and distribution facilities, gypsum and other waste disposal facilities, repair and maintenance facilities temporary or desirable in connection with the operation of the Enterprise …. " The next stage is the "operating period" when mining takes place. Article 9.1 states; "As the construction of the enterprise facilities are progressively completed," the company will "commence the operation of such facilities on the mining and processing areas and the conduct of all other activities contemplated by the Enterprise and shall achieve commercial production by no later than two years following the end of the construction period, and the company shall be authorized to continue such operations and activities for the duration of the operating period, as long as the company abides by its obligations under this Agreement and Applicable Law". "Operating Period" is defined in the Agreement to mean "the period commencing on the day following the end of the construction period and continuing for so long as the Company shall continue to conduct operations with respect to any phosphate mineral reserve within the Exploration and/or Mining Area and, provided the Company has not permanently abandoned or terminated ots operations and given notice thereof to the Secretary, for a period of not less that 25 years following the commencement of Commercial Production, or such longer period as the Secretary, on the written application of the Company may approve." Finally, the product will be sold in the market. This is dealt with in Article X.

SUSTAINABLE DEVELOPMENT

In the introduction to the proposed Mineral Investment Agreement, it is stated, "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." (The emphasis is mine).

Undoubtedly, the state has the right to exploit its own resources pursuant, however, to its own environmental and development policies. (Cf. Principle 21 of the U.N Stockholm Declaration (1972) and Principle 2 of the U.N. Rio De Janeiro Declaration (1992) Rational Planning Constitutes an essential tool for recognizing any conflict between the needs of development and the need to protect and improve the environment. (Principle 14, Stockholm Declaration) Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. (Principle 1, Rio De Janeiro Declaration). In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. (Principle 4, Rio De Janeiro Declaration). In my vie, 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 buiding in the way in which and 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 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.

During the hearing, learned counsel for the 5th and 7th respondents, submitted that the project must go ahead; because the people would otherwise "starve". In his written submissions he stated that as "trustee of the natural resources of the country … the Government cannot sit back and do nothing. That would be a sin of omission and would be as such a breach of trust as if the Government did act wrongly … It is common ground that the phosphate has to be developed. All the experts are agreed that the phosphate cannot be permitted to lie underground".

While, as I must on account if its extravagance reject learned counsel's claim that people would "starve" if the project is not proceeded with, it might be pointed that there seems to be no disagreement that the phosphate deposit should be utilized. Indeed, an hypothesis has been advanced that the Eppawela deposit was not "discovered" in 1971, but was known to our rulers and people for thousands of years and shared the thought that the deposit should be utilized. The difference between them and us is how this should be done. The ingenuity of the rulers and people of Sri Lanka in times gone by, it is suggested, had created a stable and sustainable agricultural development system harnessing the key natural resources available within their natural habitat, including the Eppawela deposit. The natural processes of weathering, microbial activity and precipitation might have released plant nutrients which were carried overland by flowing into the reservoirs, channels and rivers as well as permeating into the soil matrix and possibly reaching underground aquifers. (see Ivan Amarasinghe, Eppawala; Contribution to Nutrient Flows in the Ancient Aquatic Ecosystems of Rajrata)

In 1974, it was decided to use the Eppawela deposit through a District Development Council. The D.D..C. was an organisation aimed at harnessing resources at "grass roots" level, utilizing locally available resources with the minimum use of foreign or imported expertise, techniques and technology, and providing maximum employment opportunities and the most favourable benefits to the locality. The annual production of the Eppawela D.D.C. projects was to be 50,000 tons, and at that rate of extraction, it was estimated that the deposit would serve the country for a very long time, perhaps a thousand years. Moreover, the D.D.C. project was designed to quarry the phosphate and not to mine it, and such quarrying operations were to be far from the Jayanganga.

It has been the policy of successive governments during the past three decades that the Eppawela mineral deposit should be put to use. In fact, Lanka Phosphate Ltd., the 6th respondent, under a licence issued by the Geological Survey and Mines Bureau has been mining about 40,000 metric tons of rock per annum for crushing and marketing to enterprises making fertilizer. That modest operation, the petitioners explain, caused them no concern. However, in view of the escalation of the amount to be mined under the proposed agreement to 26.1 million metric tons within thirty years from the date of the signing of the agreement, the petitioners fear (a) that existing supplies will be exhaused too quickly, and (b0 that the scale of operations within the stipulated time frame will cause serious environmental harm that would affect their health, safety, livelihood as well as their cultural heritage. The petitioners do not oppose the utilization of the deposit. However, they

submit that the phosphate deposit is a "non-renewable natural resource that should be developed in a prudent and sustainable manner in order to strike an equitable balance between the needs of the present and future generations of Sri Lankans".

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.

There are many operational definitions of 'sustainable development', but they have mostly been variations on the benchmark definition of the United Nations Commission on Environment and Development chaired by Fro Harlem Bruntland, prime Minister of Norway, in its report in 1987….. development that meets the needs of the present without compromising the ability of future generations to meet their own needs".

Some of the elements encompassed by the principle of sustainable that are of 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 o environmental considerations into economic and other development plans, programmes and projects -- the principle of integration of environment and development needs.

International standard setting instruments have clearly recognized the principle of inter-generational equity. It has been stated that humankind bears a solemn responsibility to protect and improve the environment for present and future generations. (Principle 1, Stockholm Declaration) . The natural resources of the earth including the air, water, land flora and fauna must be safeguarded for the benefit of present and future generations. (Principle 2, Stockholm Declaration). The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind (Principle 5, Stockholm Declaration) The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations. (Principle 3, Rio De Janeiro Declaration). 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 us. It is not something new to us, although memories may need to be jogged.

Judge C.G. Weeramantry, in his separate opinion in the Danube case (Hungary v. Slovakia), (supra), referred to the "imperative of balancing the needs of the present generation with those of posterity". Judge weramantry referred at length to the irrigation works of ancient Sri Lanka, the Philosophy of not permitting even a drop of water to flow into the sea without benefiting humankind, and pointed out that sustainable development had been already consciously practiced with much success for several millenia in Sri Lanka. Judge Weeramantry said; "The notion of not causing harm to others and hence *sic utere tuo ut alienum non laedas* was a central notion of Buddhism. It translated well into environmental attitudes. *"Alienum'* in this context would be extended by Buddhism to future generations as well, and to other component elements of the natural order beyond man himself, for the Buddhist concept of duty had an enormously long reach".

Contemporary law makers of Sri Lanka too have been alive to their responsibilities to future generations. Thus, section 17 of the national Environmental Act makes it a mandatory duty for the Central Environmental Authority to '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."

The call for sustainable development made by the petitioners does not mean that further development of the Eppawela deposited must be halted. The Government is not being asked, to use learned counsel's phrase to "sit back and do nothing".

In my view , the human development paradigm needs to be placed within the context of our finite environment. So as to ensure the future sustainability of the mineral resources and of the water and soil conservation ecosystems of the Eppawela region, and of the North Central Province and Sri Lanka in general. due account must also be taken of our unrenewable cultural heritage. Decisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally, including the petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans.

According to the Geological Survey Department (presently the Geological Survey and Mines Bureau), the 3rd respondent, the Eppawela deposit is said to have a proven reserve of 25 million metric tons and an inferred reserve of another 35 million metric tons. However, as a Director of the 5th respondent, Mr.Gerry L. Pigg, and a Director of the 7th respondent, Mr.U.I De Dilva Borelessa, state in their affidavits, " the actual extent of the phosphate reserves in Sri Lanka is not known today", and " it would take exploration to discover the new reserves which would move the inferred reserves into the proven category." The Secretary of the Ministry of Industrial Development, Mr. S. Hulugalle, in his affidavit states that " only 26.1 million metric tons of rock phosphate will be mined over the entire 30 year project period and the deposit contains 25 million metric tons proved reserve and 35 million metric tons of inferred reserve. Therefore after the 30 year period there would still be a substantial amount to phosphate reserve." The Deputy Solicitor- General stated as follows: "If the Mining Licence is given in terms of the Mines and Minerals Act No.33 of 1992, the project company will only be entitled to mine 26.1 million metric tons for the entire 30 year period. This amount when compared with the 'available resource ' at Eppawela is somewhat negligible."

How could it be asserted with any degree of confidence at this time, when no exploration has taken place, that only a comparatively "negligible" quantity of the available deposits will be extracted so that at the end of the 30 year project period there would remain a "substantial" amount of phosphate? As Mr. Pigg and Mr.De Silva Boralessa, quite correctly in my view, point out, until exploration, we really do not know what the reserves are, except for the already proven reserve of 25 million metric tons.

The National Academy of Sciences in its report (P10) points out that in May 1995, a committee of five scientists and two economists appointed by the President of Sri Lanka recommended that " a more comprehensive geological reserve evaluation be undertaken in the light of recent research findings so that government can make a decision on the rate of exploration of such reserves. The decision on the rate exploration should be made taking into account the important concerns about the use of the

resources in a manner that future generations can also benefit". No such survey has been done, although it should, for reasons I shall presently explain, have been done before the negotiating committee appointed by the President to conduct the final round of negotiations recommended the signing of the proposed agreement. The National Academy of Sciences calls attention to the fact that if after exploration is carried out under the proposed agreement it is found that the inferred reserves are less than presently anticipated, there is no provision in the proposed agreement to slow down the exploitation rate with the result that almost all of the National Reserves could very well be exhausted at the end of the 30 years. The importance of giving effect to the recommendation of the President's Committee which reported in May 1995 that a comprehensive geological evaluation should be done so that more certain information would be available on the quantity and quality of the phosphate at Eppawela cannot be overstated, for on it would depend reliable conclusions being reached on how best in the national interest the mineral resources should be utilized, from the point of view of the rate of extraction, having regard to consideration of sustainable development and the feasibility of alternatives, such as the production of single super phosphate fertilizer to meet only local requirements rather than producing Di-ammonium phosphate. It is also important from the point of view of accurately assessing the Government's contribution. In terms of Article 2.16 of the proposed agreement Lanka Phosphate is given a ten per cent. holding. What if the exploration reveals a deposit that in terms of quantity and quality exceed the current assumptions? Government's contribution would then have been underestimated. And so, even if the Geological Survey is to be undertaken as a part of the proposed agreement, is it in the best interests of the country to limit the share holding to ten per cent. at this stage merely on the basis of a pessimistic guesstimate when better information can be had, and ought, on so important a matter, to be required and had before policy decisions are taken, let alone binding contracts being entered into?

The National Science Foundation's Committee stated as follows: "Mining of rock phosphate should be done at a controlled rate (e.g. 350,000 mt per year) so that the present deposit could be utilized by several generations. However, if more deposit are found, the rate of exploration could be revised, the guideline being that the ore should last at least 200 years for use in Sri Lanka's Agriculture." (The emphasis is mine).

Let us look at he matter in the context of the optimistic scenario predicted by the Secretary of Industrial Development and the Deputy Solicitor-General with regard to the quantum of deposits. Assuming that 26.1 million metric tons will be mined within the 30 year project period, and that the deposits will not be exhausted, is ti prudent to enter into the proposed agreement from the point of view of the long term, future interests of the country, having regard to the fact that phosphate is a non-renewable resource? The report of the National Science Foundation (P12) points out that the Eppawela deposit is of considerable value to Sri Lanka because phosphate deposits are non-renewable and dwindling resources in the world like fossil fuel, and should be "wisely utilized." Citing herring and Fantel's landmark study, the National Science Foundation points out that, on the basis of current information, the worldwide phosphate reserves will be exhausted in 100-150 years. Herring and Fantel state as follows:

".... the ineluctable conclusion in a world of continuing phosphate demand is that society, to extend phosphate rock reserves and reserve base beyond the approximate 100 year depletion in date must find additional reserves and/or reduce the rate of growth of phosphate demand in the future. Society must:

(1) increase the efficiency of use known resources of easily minable phosphate rock; (2) discover new, economically-minable resources; or (3) develop the technology to economically mine the vast but currently uneconomic resources of phosphate that exist in the world. Otherwise, the future availability of present cost phosphate, and the cost or availability of world food will be compromised, perhaps substantially."

(The emphasis is mine).

Adverting to learned counsel's submission about starvation, one might ask, should the lives of future generations of Sri Lankans be jeopardized?

The National Science Foundation states that " The irrefutable conclusion is that the Eppawela rock phosphate deposit should be exclusively reserved for the country's use for generations to come." It indicates alternative methods to ensure the use of the deposit to meet the fertilizer demands of the country while conserving the reserves for the use of future generations. The Secretary of the Ministry of Industrial Development has misunderstood the matter in making his averments in paragraphs 18(c) and 19(b) of his affidavit. It was no one's case that he New Zealand proposal should have been considered in deciding upon responsive bids to the Government's call for tenders. What is asserted is that at some time, in considering policy options, the Government ought to have taken or ought to take the New Zealand proposal into account as being more appropriate (having regard to the inter-generational principle and environmental considerations) in the matter of the development of the Eppawela phosphate deposit before adopting the course of action decided upon by the Government as expressed in the proposed agreement.

The Secretary of the Ministry of Industrial Development in his affidavit stated that " with the development of technology and market conditions, a mineral deposit may also cease to be a resources as has happened to the tin industry in the world with the advent of plastic.." Sustainable development requires that non renewable resources like phosphate should be depleted only at the rate of creation of renewable substitutes. What is the known renewable substitute for phosphate? Herring and Fantel, as we have seen, refer to a " continuing phosphate demand. " Does the first respondent assume that plants will need bo phosphorous? On that matter, prof. O.A Illeperuma of the Department of Chemistry, University of Peradeniya, with some asperity, had this to say (P11): " There are some wisecracks who say that scientists will develop new plants which will grow without phosphorous. Anyone with even a rudimentary knowledge of science knows that phosphorous is an essential component of our bone structure and when such varieties of cash crops are indeed possible then we will have humans with no bones who will probably move around like jellyfish!..."

If in fact the optimistic views of th Secretary of Industrial Development and the Deputy Solicitor-General are confirmed by exploration, learned counsel for the petitioners submitted that it does not necessarily follow that at the end of the thirty years after the signing of th proposed agreement, the Government of Sri Lanka will be in control of the mining operations. i find myself in agreement with that submission of learned counsel for the petitioners, for the proposed agreement defines " operating period" to be a "a period of not less than 25 years following the Commercial production , or such longer period as the Secretary, on the written application may approve." Article XXX of the proposed agreement states, inter alia, that the Agreement "will continue in force until the later to occur of the following dates: (a) the date which is 30 years following the date

of the signing of the Agreement, or (b) the date on which the Operating Period expires. The Company may request the extension of this Agreement on terms to be negotiated..." If the Secretary approves the application of the company for the extension of the Operating Period, he thereby extends the Operating Period; there is then no need for the company to apply for the extension of the agreement on terms to negotiated.

The petitioners also state that the Eppawela deposit is an agriculturally developed area which is also the location of many historical viharas and other places of archaeological value. It is also the area of the Jaya Ganga/Yoda Ela scheme which is considered to be among the greatest examples of Sri Lanka's engineering skills and forms an important part of the irrigation network of the North Central Provision. They allege that over 20 new and ancient irrigation tanks and about 100 kilometres of small irrigation canals are in danger of being destroyed. Five kilometres of the Jaya Ganga, they say, will be affected which could adversely affect the entire irrigation system of the North Central Province in which it is an important link. The petitioners further allege that a factory for the production phosphoric acid and sulphuric acid which are highly polluting substances will be constructed at Trincomalee using a 450 acre land next to Trincomalee Bay. The petitioners also allege that the environmental pollution resulting from the said project will be massive and irreversible and will render the affected area unusable in the foreseeable future. Waste products from the large scale mining of phosphate as envisaged by the project include phopho-gypsum and other behind large pits and gullies which will provide a breeding ground for mosquitoes and lead to the spread of dangerous diseases such as malaria and Japanese encephalitis. the petitioners further state that the past record of environmental pollution by Freeport MacMoran and IMC Agrico (the major share holder in the 5th respondent company) is notorious even in their own home country, namely, the United States of America.

The National Academy of Science of Sri Lanka (see below) also makes critical comments about the past experience of Freeport MacMoran.

With regard to the gypsum as a by-product, the first respondent in his affidavit states: " The project is expected to produce approximately 1.2 metric tons (sic.) off phospho-gypsum per annum as a by products." He suggests that rather than being a problem, it would be a boon for which we should be thankful, for a part of this, he says, could be sold to local cement manufacturers and used in the manufacture of "plier and boards". Have market studies been done? Gypsum may pose no danger if the quantities are manageable. The scale of operation is important if the by- products are to be utilized without causing environmental damage. Could the amount of gypsum produced be absorbed by the cement manufacturers and others having regard to the fact that, according to the Academy of Science, there will be "a million metric tons of phospho-gypsum"? The National Science Foundation in its Executive summary states: " The U.S Mining Company proposal is not environment friendly: Mountains of phopho-gypsum will accumulate polluting the environment." Mr.Thilan Wijesinghe, in his letter dated March 30, 1998 (P7), notes that 2.1 metric tons per annum of rock phosphate would be mined and processed". The 1st respondent seems to have been confused about the amount of rock phosphate to be mined and processed and the amount of phospho-gypsum left behind. If, the gypsum is not in fact absorbed in the way envisaged by the first respondent, is it to lie somewhere? Not everyone is willing to form opinion on grounds admittedly inaccurate or insufficient. Prof. O.A Illeperuma stated as follows (P11) : " This may not be problem for large countries such as USA where phopho-gypsum mountains are visible dotting the Florida landscape, since open and barren land is

available in large countries such as the U.S.A Sri Lanka, on the other hand, is one of the most overcrowded countries in the world where even finding a site to dump domestic garbage has become a serious problem." The evidence before us points to the fact that the quantity of phopho-gypsum would grossly exceed the assimilative capacity of the environment.

In the circumstances would the gypsum end up in the sea? The minutes of the meeting held o the 22nd of January 1998 at the CEA state as follows: "Mrs Priyani Wijemanne, GM/MPPA highlighted the possible impacts on marine eco-systems at eh Tirncomalee site and requested that those should be carefully looked into during the Environmental Impact Assessment Stage. She submitted a report to the Chairman of issues that should be addressed."

I do not know what Ms. Wijemanne said in her report, but attention is drawn, especially of the 4th respondent in applying the National Environmental Act and the regulation framed there under, ti the principles of th stockholm Declaration: " The discharge of toxic substances..... in such quantities or concentrations as to exceed the capacity of the environmental to render them harmless, must be halted in order to ensure that serious or irreversible damage is to inflicted upon eco-system. The just struggle of the peoples of all countries against pollution should be supported." (principle 6). "States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine life, to damage amenities or to interfere with other legitimate uses of the sea." (Principle 7) . It might be noted, particularly by the 4th respondent, that principle 15 of the Rio De Janeiro Declaration marked a progressive shift from the preventive principle recognized in Principles 6 and 7 of the Stockholm Declaration which was predicated upon the notion that only when pollution threatens to exceed the assimilative capacity to render if harmless, should it be prevented from entering the environment. Principle 15 of the Rio De janeiro Declaration stated: "In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation." The precautionary principle acts to reverse the assumption in the Stockholm Declaration and, in my view, 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 form reaching the environment.

The National Academy of Sciences states in its report as follows:

"Assuming that the ore reserve are as high as envisaged, and that the ore has a high content of iron and aluminium impurities, di-ammonium phosphate with its high phosphorous content and also containing some nitrogen is a good value added product for the export market. However the high technology required will include setting up ammonia, phosphoric acid and sulphuric acid manufacturing plants, which together with the liquid processing technology involved can lead to serious environmental hazards including the production for high toxic waste by products and release of toxic pollutants to water bodies and the atmosphere.

If the economically exploitable ore reserves are not much higher than 30 million metric tons, and 70% of this is high quality, it might be more prudent to follow the advice of our scientists and accept the New Zealand Fertilizer Group's proposition (estimated to cost $ 20 million US Dollars) to produce 150,000 metric tons of single super-phosphate per year to meet only local requirements

even if in the short term it may appear to give less monetary benefits. This will preserve our ore reserves for a much longer period, involve simpler technology, leave no environmentally hazardous waste by-products such as a million metric tons of phospho-gypsum, and there will be no need for ammonia and phosphoric acid plants which produce toxic effluent. Of course the lower grade.... single super-phosphate would lose out on high transport cost per unit nutrient and may leave little export demand. Furthermore, under our free market liberal economy, locally produced single super-phosphate may be more expensive to our farmers than imported high phosphorous content fertilizer such as triple super-phosphate on unit nutrient value bases unless the local product is given fiscal protection. The decision on what fertilizer should be produced locally must await the results of the comprehensive exploration phase.

The report adds as follows

" Mining and processing of the products as envisaged will be an operation of unprecedented magnitude in Sri Lanka, and the potential environmental impacts could be equally drastic. At the mining site there will be severe disturbances to the ecology of the area through, among others, the mining operation itself, the infrastructural activities and the discharge of pollutants to the atmosphere. At the processing site, the effluents and other pollutants that will be discharged would pose severe environmental threats unless adequate counter measures are adopted. Although the proposed arrangement with the prospector has provision to the effect that the operations will be carried out with due respect to the laws of the country, and the National Environmental Act does contain provisions to guard against adverse environment impacts, we are of opinion that for an operation of this magnitude additional safeguards should be adopted. This is particularly important as mining prospectors the world over are notorious for creating environmental disasters, and Freeport MacMoran is no exception. In fact, according to media reports, Freeport MacMoran, one of the largest fertilizer manufacturing companies in the world, has the dubious distinction of being also No. 1 polluter in the USA. It has also had a poor record in Indonesia and in the South Pacific island of New Guinea. It would also be prudent to check on the company's credibility pertaining to environmental matters by calling for the relevant reports from USA, New Guinea and Indonesia before project approval... Through study of such reports, we would be in a better position to insist on the incorporation of stronger and more effective measures in the Agreement to ensure environment safety. It should be expressly stated in the Agreement that the mining operations and the processing should be carried out in accordance e with the environment standards set by the Government of Sri Lanka. The Agreement should also specifically state the ecological restoration of the areas affected by the mining must be carried out by the prospector at his own cost progressively during the period of mining operations and as directed by the Government of Sri Lanka. The Agreement must be explicit that failure to observe these environmental protection measures could result in the termination of the project. We draw special attention to the fact that the Jaya Ganga which is within the area to be mined has been regraded as a wonder of the ancient world and a cultural monument to be preserved by UNESCO's world Heritage Convention. (D.L.O Mendis, The Island, 14 April 1998)"

The petitioners' assertions with regard to apprehended harm from the proposed project also finds support in the report of the National Science Foundation (P12) which stated that the project "in the view of many of the professional Associations in the country, e.g The Institution of Engineers,

Institute of Chemistry, The National Academy of Sciences and most individual scientists and engineers is highly disadvantageous to the country and with highly adverse environmental impacts.'

The report adds:

"The proposal of exploitation of the apatite mine is beset with many problems. Mines always cause damage to (the) environment and minimization of such damage must be examined at length. Further,(the) Eppawela phosphate ore is located in an agriculturally developed system, in an area of extreme historical importance and of archaeological value in the proximity of (national) monuments close to the Cultural Triangle sites with the Sri Mahabodhi and Ruwanweli Saya. Within the bounds of (the) mining area are many ancient villages, which will be adversely affected. The immediate threat to the Jaya Ganga or Yoda Ela cannot be overlooked. If the mining of the ore damages the jaya Ganga, it denigrates Sri Lankan history. Jaya Ganga is an engineering marvel that must be preserved for eternity as the heritage of mankind just as the Taj Mahal, the Pyramids or Ruwanweli Saya are preserved for posterity."

The Eppawela project,a as the petitioners, the National Science Foundation and the National Academy of Science point out, is in an area of historical significance. If I might adopt the words of Martha Prickett Fernando in her comments on another proposed project- the augmentation of the Malala Oya basin from Mau ara, "Unless development activities in area like this project are accompanied by proper EIA studies and (proposals for) mitigation of the (adverse impacts on) archaeological resources that will be damaged, vast numbers of sites-in fact, much of Sri Lanka's unrenewable cultural heritage and the raw data for all future studies on ancient Sri Lanka- will be destroyed without record, and an accurate understanding of life in ancient Sri Lanka will remain forever wrapped in myth and hypothesis." In fact connection, the words of D.D Kossambi (The Culture and Civilization of Ancient India) come to mind: "To learn about the past in the light of the present is to learn about the present in the light of the past."

Ignorance of vital facts of historical and cultural significance on the part of persons in authority can lead to serious blunders on current decision making process that relate to mote that rupees and cents. The first respondent, the secretary to the Ministry of Industrial Development, in paragraph 13 of his affidavit states as follows: " The Southern part of the Yoda Ela has been abandoned after the construction of Jaya Ganga in 1980's under the Mahaweli Scheme." (The emphasis is mine). Judicial restraint prevents me form suggesting why he might, perhaps, have through it was called "Jaya" Ganga.

The Kalaweva, which helped to supplement the supply of water to Anuradhapura and the area around that great and ancient city, was constructed by King Dhatusena (455-473 AD) and ir is ., therefore supposed, though not conclusively established, that Dhatusena also built the jaya Ganga which augmented the tanks at Anuradhapura and its environs such as Tissa, Nagara and Mahadaragatta, apart form irrigating a large area of land of about 180 square miles. (See K.M de Silva, History of Sri Lanka, p.30; R.L Brohier, Ancient Irrigation Works in Ceylon, Part II, pp.7-8)

The maps produced show that the Jaya Ganga passes through the Eppawela phosphate deposit region. It was, as Brohier says, a part of " an ingenious net-work of irrigation channels in this

district... which , apart from affording edification to future generations, are monuments of the power and edification to future generations, are monuments of the power and beneficicence of the ancient rulers of Ceylon." Whether it was built by Dhatusena or not , according to Chapter 79.58 of Mahawamsa, Parakrambahu I (1153-1186 AD) " had the ruined canal called Jaya Ganga restored. It branched off from Kalavapi and flowed to Anuradhapura." It is a 54 1/2 mile long contour channel that starts from a sluice in the bund of the Kala Wewa and ends in the Tissa Wewa and Basawakulama tank in the ancient city of Anuradhapura. Assuming that some people not only do not know the basic facts of history, but might also be ignorant of elementary geography so as not to be able to read the maps that were produced, it might be explained that the function of the Jaya Ganga in ancient times appears to be twofold: to intercept the drainage fro the land to the east and issue it to cascades of smaller village tanks to the west , in the basin of the kala Oya; and, by trans-basin diversion, to augment the Anuradhapura city tanks and provide irrigation water in the adjacent Malwatu Oya basin. Brohier states that this ancient canal, which had again been restored in 1885-1888,

"had a gradient for the first 17 miles of only six inches per mile... Such an ingenious memorial of ancient irrigation skill cannot be passed over without a reference to its peculiar features. It needs to be explained that the Jaya Ganga follows the high ground between the reservoir which serves as its source of supply and the Tissawewa. By this means it intercepts all the drainage between Elagamuwa and the western watershed of the Malwatuoya which otherwise would run to waste and it irrigation the country below the canal by a most perfect system of irrigation. In each of the subsidiary valleys on its course the water is diverted by channels into little village tanks or chains of tanks- the tanka lower down receiving the overflow from the tanks placed higher in each chain.

The scheme was so perfect that the ancient canal afforded irrigation facilities over approximately 180 square miles of country on the east of the Kala-Oya, between Kalawewa and Anuradhapura. It today feeds no less than 60 villages and to the town of Anuradhapura.

There is under such circumstances, little reason to dispute that the Jaya-Ganga must have been of incalculable benefit of Nuwarakalawiya in the days of the Sinhalese Kings, inasmuch as the restoration of the work is today but too aptly described as' the grandest experiment in irrigation ever undertaken in modern Ceylon.'"

The Jaya Ganga, which the petitioners, as well as the National Academy of Sciences and the National Science Foundation, have drawn attention to, is not merely a water course or transportation canal corridor, or even ' an amazing technological feat", as Prof. K.M De Silva describes it; it is also an integral part of a human-made water and soil conservation ecosystem. ,Its preservation is therefore not only of interest to the literati at a higher plane, ads a matter concerning the heritage of humankind that must be preserved, but also, at the more mundane level of the petitioners and thousands of others like them who depend on the continued and efficient functioning of that ecosystem for the pursuit of their occupations and indeed for sustaining their very lives, matter of grave and immediate personal concern.

The respondents and their learned counsel submit that environmental concerns have been sufficiently addressed in the proposed agreement.

The 1st respondent in his affidavit stated that exploration and mining licences cannot be issued in respect of archaeological reserves. Plants for the production of phosphoric acid and sulphuric acid cannot be constructed before compliance with the Environmental Act. If and when the Agreement is entered into, the Project Company is required to carry out exploration and feasibility studies after which the project is required to submit itself to the EIA process before mining is commence. A detailed Mine Restoration Plan and a Mine Restoration Bond are required. Moreover the company is required to comply with requirements of the Mines and Mineral Act, the National Environmental Act and the Mahaweli Authority Act and to conduct its operations o as to minimize harm tot he environment, protect natural resources, dispose of waste in a manner consistent with good waste disposal practices and in general to provide for the health and safety of its employees and the local community and also be responsible for he " reasonable preservation of the natural environment within which the project company operates." The 1st respondent further stated that the Government is empowered to suspend the operations of the Company "if is determines that severe environmental damage associated with the company's violation of applicable law is resulting from Company's operations which the company has failed to remedy.' Attention is drawn to the maintenance of an Environment Restoration Escrow Account, the requirement to furnish a Mines Restoration Bond which, he states, "would be adequate to cover any environmental damage and to effect the necessary restoration work.' In his opinion, since there are adequate safeguards in the proposed agreement " to make the Company responsible to take necessary steps to minimize and rehabilitate any damage to the environment and local community", the 1st respondent concludes that "it is premature to form an opinion on the nature and extent of the environmental damage which may take place due to this project."

The Directors of the 5th and 7th respondents stated in their affidavits that in introduction to the agreement it is stated as follows: " (D) In the process of developing mineral resources, the Government gives high priority to the protection of the environment and avoidance of waste and misuse of its resources. (F) The Company (5th Respondent) is ready and willing to proceed in these undertakings, and to assume the risks inherent therein in exchange for the rights and benefits herein provided, all pursuant to the terms and conditions set forth in the agreement." It is stated that until the Environmental Impact Assessment and Feasibility study are done, the concerns set out in the petition cannot be satisfactorily addressed. The Exploration Licences issued to the 6th and 7th respondents are subject to the rights of the owner or occupant of the land covered by the licence and to the provisions of the Mines and Minerals Act and the regulations made thereunder. They state that they would bring to bear current technology for both phosphoric and sulphuric acid which have mitigated very nearly all of the pollution aspects of such plants. All this will be subject to the EIA and Feasibility Study. They submitted the IMC Global Environmental, Health and Safety Standards and Guidelines Manual in support of their averment that the Board of Directors of IMC had adopted a very specific and enforceable policy towards environmental, health and safety policies. They state that with the merger of MacMoran Inc. into IML-Global Inc., Freeport MacMoran ceased to exist. This was a part of the consolidation occurring in the fertilizer industry at the time and not an attempt to hide the former Freeport MacMoran Inc.'s involvement in Sri Lanka on the projet. What troubles the petitioners is that although Freeport MacMoran with a bad record on pollution has ceased to exist, its spirit roams doing important things, such as seeing the President (see P4) and initialling the final draft of the proposed agreement. While liabilities are placed on Sarabhumi, a small local company, whereas the decision to accept the tender was based on the size and capacity of the multi-national giant Freeport MacMoran.

Learned counsel for the respondents submitted that in terms of Article VII of the proposed agreement, there has to be a feasibility study and a report thereon. The report must have a section reporting the results of environmental impacts studies as described in Annex E to the Agreement. The section of the report will be prepared by an appropriately qualified internationally recognized independent consulting firm approved by the Government. The study must meet the requirements of Article 25. Article 25.2 provided as follows:

" The Company shall include in the Feasibility Study an environmental study in relation to all enterprise activities in accordant with Applicable Law, and shall also identify and analyze as part of the Feasibility Study the potential impact of th operations on land, water, air, biological resources and social, economic, culture and public health. The environmental study will also outline measures which the Company intends to use to mitigate adverse environmental impacts of the Enterprise (including without limitation disposal of overburden and tailings and control of phosphate and fluorine emissions) and for restoring and rehabilitating the Contract Area and any project Areas at the termination of this Agreement. The Feasibility Study shall provide an estimate of the cost of such restoration and rehabilitation. The Feasibility Study shall also include procedures and schedules relating to the management, monitoring, progressive control, corrective measures and the rehabilitation and restoration of all Contract Areas and Project Areas in relation to all adverse effects on the environment as are identifies in the Feasibility Study. The Study will also provide an estimate of the cost of such activities."

Article 25.1 provide as follows:

"The Company shall in relation to all matters connected with the Enterprise comply with the Mines and Mineral Act, No. 33 of 1992, the National Environmental Act, No.47 of 1980 (as amended by Environmental Act Np. 56 of 1988, the Mahaweli Authority of Sri Lanka Act No.23 of 1979, the Regulations made thereunder and all other Applicable Law and generally prevailing standards for mining operations. Without in any way derogating from the effect of the above mentioned Applicable Law and mining standards, the company shall conduct all its operations under this Agreement so as to minimize harm to the environment (including but not limited to minimizing pollution and harmful emissions), to protect natural resources against unnecessary damage, to dispose of waste in a manner consistent with good waste disposal practices, and in general to provide for the health and safety of its employees and the local community. The company shall be responsible for reasonable preservation of the natural environment within which the company operates and for taking no acts without Government approval which may block or limit the further development of the resources outside the mining and processing areas...."

Learned counsel for the respondents submitted that until the feasibility study is done and the development plan is prepared, there is no way of finding out the location of the mine and method of mining and whether in terms of the project any body will be relocated. In terms of the agreement, after the preparation and submission of the feasibility study, if the company decides to proceed with construction, it must submit a development plan with its application for construction to the Secretary, who may withhold approval for proceeding with the project.

In terms of Article 7.7 " if and only if the Secretary determines that implementation of the Development Plan together with any modification thereof which may be reflected in the Company's application to construct and operate: (a) will not result in efficient development of the mineral resource, (b) is likely to result in disproportionately and unreasonably damaging the surrounding Environment, (c) is likely to unreasonably limit the further development potential of the mineral resources within the Mining Area, or (d) is likely to have a material adverse effect on the socio-political stability in the area which is not offset by the potential benefits of the project or by mitigating measures incorporated into the Development Plan. 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." The Article goes on to state that if the Secretary has any objections or suggestions, they should be communicated to the company, and in the event of any mutually acceptable resolution under Article XX as to whether the Secretary has " substantial cause for withholding approval of the Feasibility Study Report, Development Plan and application to construct and operate, and if substantial cause is determined to have not existed, the Secretary shall promptly issue his (her) approval of such Report, Plan and application..." (The emphasis is mine)

Learned counsel for the 5th and 7th respondents submitted that if the Secretary wrongfully approved the feasibility study, it is "only at that stage, if at all" persons will be able to challenge matters in Court. 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 the provisions of Article 5.5, the Feasibility Study and Development Plan are to be treated as "confidential". The Government may in term of Article 5.5 disclose " data and information which the Government determines in good faith is necessary to disclose to third parties in order to protect the national interests of Sri Lanka"; but what is the guarantee that the Government will release the Feasibility Study and Development Plan when they ate available? The petitioners and other persons who may be affected will probably be on better informed than they were at the time of making this application. In my view, the petitioners decided wisely in coming before the court when they did. Moreover, who may seek judicial review if damage if caused cultural monument or the cultural monument or cultural heritage landscape of Jaya- Ganga? Further, in my view, the words emphasised are so vague as to confer a practically unlimited discretion on the Secretary. They are so broadly framed so as to make judicial review very difficult indeed. In any event, what is the remedy available to anyone, if the Secretary's decision is pursuant to an arbitral award?

Learned counsel for the respondents stated that, since the proposed agreement expressly provides for compliance by the Company with Applicable Law, including the Mines and Minerals Act and the National Environmental Law and the regulations made thereunder, and since the company will be subject to the "stringent" requirements of the licences issued for exploration and mining, the fears of the petitioners are unfounded and "conjectural". Section 30 (1) of the Mines and Mineral Act states that no licence shall be issued to any person to explore for or mine any minerals upon, among other places, " any land situated within such distance of a lake, stream or tank or bund within the meaning of the subject of lands"; " any land situated within such distance of catchment area within the meaning of the Crown Lands Ordinance (chapter 454) as maybe prescribed without the approval of the Minister and the Minister in charge of the subject of Lands." Section 31 of the Mines and Minerals Act provides that no licence shall be issued to any person to explore for, or mine any mineral upon" (a) "an land situated within such distance of any ancient monument

situated on state land or any protected monument, as is prescribed under section 24 of the Antiquities Ordinance (Chapter 188); and (b) any land declared by the Archaeological Commissioner to be an archaeological reserve under section 33 of the said Ordinance."

One wonders whether the provisions of the Mines and Minerals Act relating to lakes, streams and bunds and catchment areas as defined by reference to the Crown Lands Ordinance Sufficiently protect the water and soil conservation ecosystem of the area affected by the proposed project. No evidence was placed before this courts as to whether any land in the exploration, mining, contract or project areas has been prescribed under the law as being land within prescribed distances from ancient monuments and what land has been declared to be an archaeological reserve. Moreover, no provision exists for the preservation of cultural heritage landscape, like the Jaya Ganga, as distinguished from a monument, lest there be some dispute about the word ' monument' : No laws can expressly provide for all situations. However, the legislature has foreseen the need to provide against omissions and stated in section 30 (2) as follows:

"In addition to any other condition that may be prescribed under this Act, the Minister of the Ministers...ma, in granting approval for a licence under subsection (1), lay down such further conditions, as may be determined by such Minister or Minister. Where approval is granted subject to any further conditions, the Bureau shall cause such conditions to be specified in the licence."

At the present time, when there has been no Feasibility Study and no Development Plan, and,moreover,when there is no guarantee that such study and plan will ever be made known to them, how could the petitioners feel assured that their individual and collective rights will be protected? There may be conditions that may be prescribed under section (30) 2 of the Mines and Minerals Act to safeguard their interests and the interests of the people of Sri Lanka, and indeed of humankind. But how is this possible without a proper evaluation of the project? A report from an "appropriately qualified", "internally recognized independent environmental firm selected by the company and approved by the Government", is of little or no use to the petitioners and concerned members of the public, having regard to the provisions in the proposed agreement regarding " confidentiality."

For the reasons set out above, I am of the view that there is, within the meaning of the Constitution, an imminent infringement of the petitioner's rights guaranteed by Articles 14 (1) (g) and (h) of the Constitution.

ALLEGED VIOLATION OF ARTICLE 12(1) OF THE CONSTITUTION

The Chairman/Director General of the 2nd respondent in a letter dated March 30, 1988 (P7) quotes the following from the Executive Summary of the report of the President's Committee dated the 9th of May 1995: "Any large-scale venture has the potential to cause an adverse environmental impact, yet it could generate substantial revenue to the country. It is also recommended that the rigorous EIA procedures laid down by the law be followed before any joint venture proposal is implemented because of the possible environmental risks associated with projects of this nature."

Learned counsel for the respondents submitted that Article XXV of the proposed agreement obliges the Company to comply with the National Environmental Act No.47 of 1980 as amended by Act,

No.56 of 1988 and the regulations made thereunder. In the circumstances the company is obliged to submit an Environmental Impact Assessment in terms of Part IV c of the Act.

The proposed agreement makes no reference to the preparation or submission of any Environmental Impact Assessment as required by the National Environmental Act and the regulations made thereunder. What the proposed agreement does, as we have seen, is to provide for an environmental study to be prepared by an international firm, selected by the company and approved by the Government, as a part of its Feasibility Study. (Article 7.6) "Feasibility Study" is defined in the proposed agreement as " a study to determine the feasibility of commercially developing any deposit or deposits identified by the company during the Exploration Period, including the items set forth in Annex "E".Annex "E" states that the Feasibility Study shall include "Environmental impact and monitoring studies into the likely effects of the operations of the Enterprise on the Environment(such studies to be carried out in consultation with an appropriately qualified independent consultant and under the terms of reference set out in Article XXV of this Agreement)." (But of.Article 7.6 where the study is to be "conducted by an internationally independent environmental consulting firm....")

Not surprisingly, therefore, although both the Deputy Solicitor General and learned counsel for the 5th and 7th respondents agreed that an Environmental Impacts Assessment was a requirement of the Law, they were unable to agree when that assessment was to be made, and what its significance was in the context of the proposed agreement.

Firstly, therefore, in terms of Principle 17 of the Rio De Janeiro Declaration, there is no Governmental Impact Assessment subject to " a decision of a competent national authority". Nor is the approval of such an authority in terms of the National Environmental Act contemplated by the proposed agreement. What does exist in the proposed agreement is an assurance that the "Applicable Law", including the provisions of the National Environmental Act, will be complied with.

According to the Deputy Solicitor General, the Company's application to construct and operate the facility had to be made "after obtaining the approval for the feasibility report, inclusive of the EIA, and the Development Plan..." He stated that "In the event the project Approving Agency refuses to grant approval for the project, the project company will have to abandon the project subject to a right of appeal to the Secretary of the Ministry of Environment. Moreover, if the project is approved after a hearing and been given to the public, the persons who are aggrieved will have an opportunity to come before the Court to have the decision quashed. There are instance where the public have invoked the jurisdiction of th Supreme Court and the Court of Appeal to suspend development projects such as the project such as the project pertaining to the Southern Expressway and the Kotmale Power Project."

According to learned counsel for the 5th and 7th respondents, "in the first place, after the feasibility report is prepared and the development plan is prepared, this project will be submitted to the project approving agency, in this case the Central Environmental Authority. The CEA, that is the statutory authority, may or may not give its approval. If it does not give its approval, the matter ends there." ;" The permission and approval of the statutory authorities, including the CEA, is essential. If that is not obtained, the project comes to an end." If there is a threat to the environment of to the people, the Central Environmental Authority will not permit the project to go ahead. The CEA is the statutory authority vested by law to determine the matter." " The Central Environmental Authority can refuse to permit the project. That is final." If the Central Environmental Authority does give its

approval, the feasibility study, development plan and the report of the international firm on environment, he said, is submitted to the Secretary of the Ministry of Industries, who may refuse it on the grounds specified in the proposed agreement. "It is only after the feasibility study inclusive of the Development Plan (Sic.) is approved by all the statutory authorities including the Central Environmental Authority that the next stage will commence. The next stage is the construction stage." Referring to the Environment Impact Assessment and the requirements under the National Environmental Act and the regulation framed thereunder, learned counsel for the 5th and 7th respondents gave the assurance that " all those steps will be followed after the feasibility study is submitted to the CEA... Therefore the public will have every right of protest after the feasibility study report is submitted to the CEA." As we shall see, the submissions of learned counsel on that matter were, having regard to the statutory requirements of the National Environmental Act and the regulations framed thereunder, seriously flawed.

Learned counsel for the 5th and 7th respondents inquired whether, after bringing in scientific and technical expertise not available in this country, and investing U.S $ 15 million not available for investment by the Government, it was too much for the 5th respondent to pray that it be permitted to proceed with the construction in the event of the statutory authorities granting approval, and the Secretary accepting the Feasibility Report and Development Plan. Learned counsel for the 5th and 7th respondents said: "Equity, righteousness and fairplay demands that the rights of all parties be equally protected; for all persons are equal biophore the law and such persons include the 5th and 7th respondents." The petitioners' state that their rights of equal protection under the law are in imminent danger of being infringed.

Learned counsel for the 5th and 7th respondents, on the other hand, submitted that the Court should not intervene "at this stage", for " the proceeding of the project", meaning probably the signing of the proposed Agreement, "will only result in (a) exploration, (b) feasibility study." He stated that " the only comfort(sic.)the 5th and 7th respondents needs and the only comfort (sic.) the 5th respondent gets from this Agreement is that after the exploration and feasibility study is done, and if (a) the statutory authorities grant permission; (b) the Secretary accepts the feasibility report, that the 5th respondent will be permitted to mine subject to the terms and conditions of th Agreement and that they be permitted to mine as set out in the feasibility report subject tot he approval of the Statutory Authority."

The proposed agreement is so framed that is generously strengthens,assists, supports, aids and abets the company's designs in respect of all of the matters referred to in the analysis of learned counsel in dealing with the various stages of the project. Article 17.3 I have quoted above is one example. There are others. E.g see Articles 2(2)(b)(i) and (iii) and (iv) and (v), 6 (f), 6(g), 6(h); 2c.4; 2.5; 2.21; 3.2; 3.4 (a) and (b); 6.1; 7.1; 7.8; 8.2; 9.3' 9.4; 9.7; 16.5; 16.6; 17.1; 17.6; 27.7. Once the proposed agreement is signed and converted into a formal, binding contract, there is little else the Government into a formal, binding contract, there is little else the Government can do except, under Article 20.1 to resort to arbitration. And there will be much less the petitioners, or for that matter nay one else, who may be adversely affected, will be able to dom. The Deputy Solicitor- General submitted that persons who are aggrieved will have an opportunity to come before the Court. There may be legal rights on paper; but how many individual people, including the petitioners, if

and when they are adversely affected by the proposed a project will be able to afford the luxury of litigation ? If they are in fact adversely affected what are the chances that they will be adequately compensated? The liabilities will not be those of the multi-national giant whose standing in the world's fertilizer business scene it is said was a decisive facto in their selection (see P4 at p.2 and also cf.at p.5), but of Sarabhumi Resources (Private) Ltd. a locally incorporated limited liability Company which presently has an issued share capital of only Rs.58,000/-.

Moreover, learned counsel for the petitioners drew attention to the inadequacy of the protection afforded by Articles 25.1 and 25.3 of the proposed agreement with regard to the repair of environmental damage. The petitioners did not share the belief expressed by the first respondent in his affidavit on the adequacy of the safeguards by way of the proposed Environmental Compliance Bond and Environmental Restoration Escrow Account and the undertaking given with regard to environmental compliance and restoration. It seems to be that the provisions in the proposed agreement on the matter are the product of outdated mainstream economic thought: They appear to be based on the views of persons who at best nominally recognize the environment or have considerable difficulty in placing a 'value' on it. Today, environmental protection, in the light of the generally recognized "polluter pays" principle (e.g see Principle 16 of the Rio Declaration), can no longer be permitted to be externalized by economists merely because they find it too insignificant or too difficult to include it as a cost associated with human activity. The cost of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project. ' This is a matter the Central Environmental Authority must take into account in evaluating the proposed project and in prescribing terms and conditions.

The signing of the proposed agreement may, in the circumstances please, and even delight the Company, but there is justification for examining the project as a whole art this stage in deciding whether those dangers referred to by the petitioners might be permitted to hang threateningly over their heads and ready to overcome them in the event of the signing of the proposed agreement and the execution of the project. Fairness to all, including the petitioners and the people of Sri Lanka as well as the 5th and 7th respondents, rather than the company's "comfort", should be our lodestar in doing justice.

In terms of Part (I) (6) of the Order of the Minister on the 18th of June 1993 made under section 23 Z of the National Environmental Act (vide Gazette Extraordinary of 24.06.1993), the proposed project, since it related to mining and mineral extraction either concerned with inland deep mining and mineral extraction involving a depth exceeding 25 metres and /or inland surface mining of a cumulative area exceeding ten hectares, is a " prescribed project" within the meaning of section 23 Z of the National Environmental Act. As such, in terms of section 23AA of the National Environmental Act, it is a project that must have had the approval of project approving agency.

Project approving agencies were, on the 18th of June, 1993 (Gazette Extraordinary, 24.06.1993) under powers vested in him, designated by the Minister under section 23Y of the National

Environmental Act, and includes the Central Environmental Authority. Learned counsel for the petitioners, for stated reasons, urged that the Project Approving Agency in respect of the Project relating to the case before us ought to be the Central Environmental Authority. Learned counsel for the 5th and 7th respondents in his oral submissions, and many times in his written submissions, stated or implied that the relevant project approving agency was the Central Environmental Agency. However, at one place he submitted that the preparation of the TOR (Terms of Reference), co-ordination and all activities would be undertaken by the CEA acting with (sic.) the PAA." According to the minutes of a meeting held on the 22nd of January 1998, submitted by learned counsel for the 5th and 7th respondents.

"During the discussion, it was emphasised that as this is the single largest investment which covers mining, transportation and manufacturing of phosphate fertilizer consisting of by-products, it is difficult to process this project as required under the EIA regulation by one single project Approving Agency (PAA) .

Therefore it was suggested that the preparation of TOR (Terms of Reference) and co-ordination of all activities would be undertaken by the CEA acting as the PAA. Assessment of th EIAR under main subsections of the project, i.e., mining, transportation and industry would be carried out simultaneously by GS & MB, Ministry in Charge of Transport and the CEA respectively. This mechanism would be drawn up at the next meeting to the concerned agencies."

This Court has no evidence as to what happened at "the next meeting", if there was such a meeting. I shall, for the purposes of this judgement assume that the decision to make the CEA the project approving agency stands. But in addition to the tentative decision on the modalities of cooperation between concerned agencies and the Central Environmental Authority acting as the Project Approving Agency, according to the minutes, it was also decided as follows at that meeting:

"As the exploration area falls within the jurisdiction of various government agencies, it was suggested that these agencies too would wish to incorporate additional conditions if any to the exploration licence. Director/Gs & MB agreed to convene a further meeting with official of the FD, DWLC, MASL, BOI and CEA for this purpose."

It was stated at the meeting that "a project proposal and an exploration plan have been prepared by the project proponent. Hence Mr. Udaya Boralessa was requested to submit 10 copies of the proposal and 05 copies of the exploration plan to the CEA, for distribution among concerned agencies." Were the copies received and distributed? Were there any responses? This Court does not know, for no evidence was placed before it on those matters.

That meeting, I might observe, in passing, was attended by the representative of several government ministries, departments and agencies, and by Mr. S. Usikoshi and by Mr. Udaya Boralessa. According to the evident on record, Mr.Usikoshi was the General Manager of Tomen Corporation which holds 25% of the shares in the project company Mr.Udaya Borelessa was the Managing Director of Novel Int. and represented IMC-Agrico. Which holds an initial equity of 65% in the 5th respondent. He is a Director of the 7th respondent.

According to the minutes of the meeting submitted by learned counsel for the 5th and 7th respondents, the meeting was chaired by the Director-General of the Central Environmental Authority who is supposed to have stated" the objectives of the meeting". Why was the meeting held? Was there an application for the approval of the project? On what date was such application made?

If an application for the approval of the project was made to the CEA or to any other project approving agency, why was no reference whatsoever made either in the pleadings or oral or written submissions of counsel for the respondent? Why as stated in the minutes of the meeting, was Mr. Borelessa "invited... to make a presentation on the proposed project for the information of participants," If there was no project proposal before the Central Environmental Authority at the time?

In terms of the National Environmental (Procedure for approval of projects) Regulations No.1 of 1993 (Government Gazette Extraordinary of the 24th of June 1993), hereinafter referred to as the "NEA regulations", when the project proponent had the goal of undertaking the mining project at Eppawela and was actively preparing to make a decision in achieving that goal (see the definition of "project" in the NEA regulations), such proponent should have made an application to the Central Environmental Authority (CEA) for approval of the project as early as possible. The project proponent might then have been required to submit to the CEA preliminary information about the project, including a description of the nature, scope and location of the proposed project accompanied by location maps and other details. (see the definition of ' preliminary information ' in the NEA regulations). Such preliminary information would then have been subjected to "environmental scoping", that is, among other things, determining the range and scope of proposed actions, alternatives and impacts to be discussed in an Initial Environmental Examination Report or Environmental Impact Assessment. (See the definition of " environmental scoping" in the NEA regulations). A matter of significance is that in the process of 'scoping' a project approving agency, such as the Central Environmental Authority, is by law empowered to "take into consideration the views of state agencies and the public." (NEA regulation 6(ii)). Having regard to the concerns expressed from time to time, the Central Environmental Authority might have exposed themselves to a charge of being remiss in the duties of a project approving agency had they failed to invite and consider the views of the public. The purpose of all this was set the terms of Reference (ToR) either for an initial environmental examination report or an environmental impact assessment (EIA). with regard to the procedures to be followed in case the approval or rejection of a project based upon an initial examination report, attention is drawn to section 23 of the National Environmental Act read with regulations 6 - 9 framed thereunder.

The Central Environmental Authority was the 4th respondent in this case and was represented by learned counsel. However, no affidavits were filed by the 4th respondent nor were any oral or written submission made on behalf of the 4th respondent. The Cental Environmental Authority, the fourth respondent, should nevertheless in carrying out its duties imposed under the order made in this judgment, have due regard to and give effect to the law, including the principles laid down or acknowledge by the Supreme Court in the matter before this Court.

It was assumed by all the other respondents and the petitioners that what would be required by the 4th respondent for the purpose of considering whether the proposed project should be approved or not was an Environmental Impact Assessment, and that if an application had been made to the Central Environmental Authority for approval of the project, that Authority would in all probability, after the process of 'scoping ' refereed to above, which might, as we have seen, including taking account of the views of state agencies and the public, have called for an Environmental Impact Assessment from the project proponent on the basis of the Terms of Reference determined by the Central Environmental Authority.

Attention is drawn, particularly that of the Central Environmental Authority, the fourth respondent, to Principle 17 of the Rio De Janeire Declaration which stated as follows: " Environmental impact

assessment, as a national instrument, shall be undertaken for proposed activates that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority. " This is an important procedural rule designed to facilitate the preventive (Principles 6 and 7 of Stockholm) and precautionary (Ate 15 of Rio) principle already mentioned above. I should like to remind the persons concerned, especially the Central Environmental Authority, that an environmental impact assessment exercise can identify the potential threats of proposed activity or project, and that this information can then be used to modify the proposed activity in order to take these threats into account. Remedial measures can also be introduced in order to mitigate or reduce any perceived detrimental impacts of the project. In this sense, therefore,a an environmental impact assessment exercise contemplated by the National Environmental Act can be instrumental in establishing exactly which areas of the proposed project, or activity require precautionary or preventive measures in order to ensure the overall environmental viability of the project.

Where the Central Environment Authority has required an Environmental Impact Assessment, the law requires such Authority to determine whether the matters referred to by the Terms of Reference have been addressed by the project proponent, and if the assessment is determined to be inadequate, the Central Environment Authority is obliged to require the project proponent to make necessary amendments and to re-submit the assessment. Upon receipt of the report required by law by "promptly notice published in the Gazette and in one national newspaper published daily in the Sinhala, Tamil and English languages" to "invite the public to make written comments, is any, thereon to the Central Environment Authority." The law requires that such notification "shall specify the times and places at which the [assessment] report shall be made available for public inspection." The Central Environmental Authority is requires by law to make available copies to any person interested to enable him or her to make copies. The law provides that any member of the public may within thirty days of the notification published in the Gazette or newspapers referred to above, make his (sic.) comments thereon the Central Environmental Authority. Since section 23BB(3) refers to making "his or its comments", having regard to the objects and scheme of the National Environmental Act, in my view, includes comments from statutory or other legal persons, as well other organizations whether incorporated or not and regardless of questions of legal personality, and by any individual, regardless of gender.

I might observe, in passing, that it is time, indeed it is high time, that the laws of this country be stated in gender-neutral terms and that laws formulated in discriminatory terms should not be allowed to exist, although protected for the time being as "existing law" within the meaning of Article 16 of the Constitution. The argument advanced that the provision in the law relating to the interpretation of statues that "his" includes her is clearly insufficient: it displays, in my considered opinion, a gross ignorance or callous disregard of such a matter of fundamental importance as the fact that there are two species of humans.

Where it considers appropriate in the public interest, and in the circumstance of this case, I cannot think that the Central Environmental Authority, having regard to what has been stated above, would really have had any choice in the matter, the Authority is by law obliged to afford all those who made comments an opportunity to be heard in support of such comments. The Central Environmental Authority is legally obliged to have regard to such comments, submissions and other materials, if any, elicited at a hearing in determining whether to grant its approval for the project. Upon completion of the period prescribed by law for public inspection or public hearing, if

held, the Central Environmental Authority is, (having regard to the provisions of section 23BB, regulation 12 of the NEA regulations and the audi alteram partem rule - hear the other side) required by law to forward the comments it received and the representations made at any hearing to the project proponent for responses. The project proponent is required to respond in writing to the Central Environment Authority. Upon receipt of such responses, the Central Environmental Authority is by law required, either to grant approval for the implementation of the project, subject to specified conditions, if any or to refuse approval for the implementation of the projects, with reason for doing so. If approval is granted, the law requires the Central Environmental Authority to publish in the Government Gazettes and in one national newspaper published daily in the Sinhala, Tamil and English Languages the approval as determined. Further, is approval is granted, there must be a place of the Central Environmental Authority to monitor the implementation of the project. (See section 23BB of the National Environmental Act and the NEA regulation 10-13.) Where the National Environmental Authority in its role as the project approving agency refuses to grant approval for a project submitted to it, the person or body of persons aggrieved have a right of appeal against such decision to the Secretary to the Ministry responsible for the administration of the National Environmental Act and the National Environmental Authority created under it.

There are also other project approving agencies designated by the Minister, but the National Environmental Authority is, the final authority in respect of environmental matters. (See also NEW regulations 6 (ii), 13, 14, 17 (ii) and 18).

As we have seen, learned counsel for the respondents were all, in my view, correctly, agreed that if the Central Environmental Authority refuses to approve the project, that is an end of the matter, subject, of course, to the right of appeal.

These salutary provisions of the law have not been observed. In terms of proposed agreement, although there is an undertaking to comply with the laws of the country, which in my view, is an unnecessary undertaking, for every person, natural or corporate must in our society which is governed by the rule of law, comply with the laws of the republic. What is attempted to be done is to contract out of the obligation to comply with the law. The Articles of the proposed agreement dealing with matters concerning environmental issues, read with the provision on confidentiality, in my view, attempt to quell, appease, abate or even, under the guise of a binding contract, to legally put down or extinguish, public protests. Learned counsel for the 5th and 7th respondents stated that Sri Lanka "does not possess the scientific knowledge or the technical know-how or the finances to develop this natural reserve." I cannot accept the assertion that Sri Lanka does not have scientists who can guide the country. Picking on "yes" persons, or persons who might be suspected to be so, as interim Article 7.6 of the proposed agreement, is another matter, and that is why conforming to the law, as laid down by the National Environmental Act and the regulations framed thereunder is of paramount importance. As for funding, that would no doubt depend on the nature of project to be undertaken and identification of sources of assistance appropriate for the chosen level of operation. Quite different considerations will apply if the decision after due investigation and debate will be to produce a quantity of single super phosphate for local use rather than producing Diammonium phosphate for export.

If the genuine intention was, as claimed by the respondents, to comply with the requirements of the law, it was, in my view, unnecessary to refer in the proposed agreement to a study relating to

environmental matters as part of its feasibility report. The law is clearly laid down in the National Environmental Act and the regulation framed thereunder. What was being attempted by the proposed agreement was to substitute a procedure for the laid down by the law. It was assumed that by a contractual arrangement between the executive branch of the government and Company, the laws of the country could be avoided. That is an obviously erroneous assumption, for no organ of Government, no person whomsoever is above the law.

In his letter to Mr. Sarath Fernando dated March 30, 1998 (P7), Mr. Thilan Wijesinghe, the Director/Chairman of the 2nd respondent, who was also a member of the Committee appointed by the President in 1997 to conduct the final round of negotiation, stated that "The Mineral Investment Agreement initialed by the FMRP and the Government incorporated most of the recommendation of the President's Committee which reported on the 9th of May 1995. The report of the Committee of the President on the 9th of May 1995 was not submitted to his Court. We can only go by Mr. Wijesinghe's account of the 1995 recommendations. And going by the accounts there was a failure to incorporate some of the most important recommendations of the Committee reporting on May 9th 1995, e.g. the need for a comprehensive geological evaluation and adherence to the rigorous EIA procedures. I am not for a moment suggesting that either Mr. Wijesinghe or any member of final negotiating Committee appointed by the President acted except n good faith. It might have been supposed that so as the geological survey fitted into the exploration process and the environmental studies proposed in the draft agreement formed a part of the Feasibility Study, al was well. It was not. Learned counsel for the 5th and 7th respondents said that the final round of negotiations and who examined the proposals were "the most responsible and highest ranking officers of the country." I accept learned counsel's estimation without any hesitation, but I am constrained in the words of Horace to say, Indignor quandoque conus dormitat Homerus - But if Homer, usually good, nods for a moment, I think it a shame.

It its "Guide for Implementing the EIA Process, No. 1 of 1998 (P20), issued by the Central Environmental Authority, it is stated as follows: "The purposes of environmental impact assessment (EIA) are to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognized and taken into account early in project design. EIAs are intended to foster sound decision making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding environmental consequences and take actions that protect, restore and enhance the environment."

The proposed agreement plainly seeks to circumvent the provisions of the National Environmental Act and the regulations framed there under. 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. I would reiterate what was said by the Court in *Gunaratne v. Homagama Pradeshiya Sabha,* (1998) 2 Sri. L.R. p.11, namely, that publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved.

Access to information on environment issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission's environmental policy for a number of years. Principle 10 of the Rio Declaration calls for better citizen participation in environmental decision-making and rights of access to environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: "Environmental issues are best handles with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

In the matter before this Court, the proposed agreement makes no mention of an environmental impact assessment in terms of the National Environmental Act. The respondents stated that under its undertaking in the proposed agreement to comply with the applicable laws, it would have submitted an environmental impact assessment, in due course, if it had been required to do so. In fact, learned counsel for the 5th and 7th respondents gave an undertaking that it would provide such an assessment. However, the law, for good reasons, as I have endeavoured to explain, requires the prescribed procedures to be followed. The times prescribed are vital. Project proponents cannot decide when, if ever they will comply with the law. There are many things that have to be done at the very earliest of stages for very good reasons. There is also a prescribed time if and when an environmental impact assessment has to be done. The parties to the proposed agreement attempted to substitute an extraordinary procedure for the proposed project. Such a procedure contravened the provisions of the National Environmental Act, and the regulations made thereunder and the guidelines prescribed by the National Environmental Authority. Thereby, reinforced by the confidentiality provision of the proposed agreement, the proposed agreement effectively excluded public awareness and participation, as contemplated by our legislature as well as by Principle 10 of the Rio Declaration. The proposed agreement ignores the Central Environmental Authority as the project approving agency although it was admitted by the petitioners and the respondents that the Central Environmental Authority in this matter was the project approving agency, and substitutes in its place, the Secretary to the Minister to whom the subject of minerals and mines is assigned for the purpose of approving the environmental study contemplated the proposed agreement. Such Secretary is not a project approving agency in terms of the National Environmental Act: Nor is he or she therefore a "national authority" within the meaning of Principle 17 of the Rio Declaration. A "national authority" is an authority recognized by the law of a concerned State. In any event, having regard to the undertaking given in Article 27.7(b) that "The Government shall render all reasonable assistance to the Company to obtain all approvals, consents, grants, licenses and other concessions as may be reasonable be require from any Government Authority", what comfort may the petitioners derive? They are, in my view, entitled to by apprehensive that even if there was a n environmental impact assessment submitted tot he Central Environmental Authority, such authority may not have been able to act impartially and independently. Of what use are biased decisions or decisions, reasonably suspected to have been made under pressure? Further, although the law of Sri Lanka provides for the judicial review of the acts of administrative authorities, and Principle 10 of the Rio Declaration calls for effective access to judicial and administrative proceedings, the

proposed agreement substitutes arbitration for such proceedings, in which, of course, the public have no role.

For the reasons given, in my view, the proposed agreement seeks to circumvent the law and 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 claim that there is an imminent infringement of their fundamental rights under Article 12(1) of the Constitution.

OVERALL ECONOMIC BENEFITS

The respondents submitted that the proposed agreement if implemented would be highly beneficial to Sri Lanka and that "when one balances the purported complaints as a re contained in the petition against the overall benefit that would accrue to Sri Lanka, the petitioners' application cannot succeed in law."

The Director of the 5th respondent, Mr. Garry L. Pigg, and the Director of the 7th respondent, Mr. U. I. De S. Boralessa, state in their affidavits that the proposed project would result in economic benefits to Sri Lanka which they specify. The report of the Committee appointed by the President (P4) lists numerous financial benefits.

Learned counsel for the p petitioners, however, submitted that the Eppawela project governed by the proposed agreement will not only be an environmental disaster but an economic disaster as well. They relied on the analysis of the social and economic considerations by Prof. V.K. Samaranayake (P10) (a); the comments of Prof. Tissa Vitarana (P9); the comments of Prof. O. A. Illeperuma (P11); the report of the National Academy of Sciences (P10); the report of the National Science Foundation (P12); and the financial analysis by Premila Canagaratna (P17).

A study of the material submitted by the petitioners shows that the question of benefits is a highly controversial matter, but one that must be gone into, for our democratic republic sets great store by the discovery of truth in matters of public importance in the market place of ideas by vigorous and uninhibited public debate. In the debate, perhaps, we need to consider whether income and economic growth on which the respondents lay great emphasis are the sole criteria for measuring human welfare. David Korten, the Founder President of the People-Centred Development Forum, once observed:

"The capitalist economy" [as distinguished from Adam Smith's concept of a market economy] "has a potentially fatal ignorance of two subjects. One is the nature of money. The other is the nature of life. This ignorance leads us to trade away life for money, which is a bad bargain indeed. The real nature of money is obscured by the vocabulary of finance, which is doublespeak…. We use the terms 'money', 'capital', 'assets' and 'wealth' interchangeably - leaving no simple means to differentiate money from real wealth. Money is a number. Real wealth is food, fertile land, buildings or other things that sustain us. Lacking language to see this difference, we accept the speculator's claim to create wealth, when they expropriate it…. Squandering real wealth in the pursuit of numbers is ignorance of the worst kind. The potentially fatal kind."

It is unnecessary for the purposes of the task in hand to enter into the matter of the alleged beneficial nature of the proposed agreement. The petitioners' case is that there is an imminent infringement of their fundamental rights guaranteed by Articles 12(1). 14(1(g)) and 14 (1(h)). I have stated my reasons for upholding their complaint. The "balancing" exercise referred to by learned counsel has been already done for use and the Constitution sets out the circumstances when any derogations and restrictions are permissible. Article 15(7) of the fundamental rights declared and recognized by Articles 12 and 14 are "subject to such restrictions as may be prescribed by law", among other things, for "meeting the just requirements of the general welfare of a democratic society." In the light of the available evidence, I am not convinces that the proposed project is necessary to meet such requirements. In any event, the circumstances leading to the imminent infringements have not been "prescribed by law3" but arise out of a mere proposed contract, and therefore do not therefore do not deserve to be even considered as permissible.

ORDER

For the reasons set out in my judgement, I declare that an imminent infringement of the fundamental rights of the petitioners guaranteed by Articles 12(1), 14(1) (g) and 14(1) (h) has been established.

There is no assurance of infallibility in what may be done: but, in the national interest, every effort ought to be made to minimize guesswork and reduce margins of error. Having regard to the evidence adduced and the submissions of learned counsel for the petitioners and respondents, in terms of Article 126 (4) of the constitution, I direct the respondents to desist from entering into any contract relating to the Eppawela phosphate deposit up to the time.

(1) a comprehensive exploration and study relating to the (a) locations, (b) quantity, moving inferred reserves into the proven category, and (c) quality of apatite and other phosphate minerals in Sri Lanka is made by the third respondent, The Geological Survey and Mines Bureau, in consultation with the National Academy of Sciences of Sri Lanka and the National Science Foundation, and the results of such exploration and study are published: and
(2) any project proponent whomsoever obtains the approval of the Central Environmental Authority according to law, including the decisions of the superior Courts of record of Sri Lanka.

I make further order that (1) the state shall pay each of the petitioners a sum of Rs.25,000 as costs: (2) the fifth respondent shall pay each of the petitioners a sum of Rs.12,500 as costs: (3) the seventh respondent shall pay each of the petitioners Rs.12,500 as costs.

R.Ammarasinghe, J.

Wadugodapitiya, J.

I agree

Gunasekara, J.

I agree.