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Eppawala controversy goes to court

The public demonstrated against it, trade unions protested, scientists condemned it - and last week the Eppawala phosphate issue was taken to the Supreme Court.

The history of this subject dates from 1971, when the Geological Survey Department discovered significant deposits of apatite or rock phosphate concentrated in an approximately 60 square kilometer area around the village of Eppawala, to the south of Anuradhapura.

Rock phosphate is a non-renewable natural resource which forms the raw material for the manufacture of phosphate fertilizer. The Eppawala deposit has proven reserves of 25 million metric tons of rock phosphate with inferred reserves of about another 35 million. Though initially thought to be of an impure variety, the majority of scientific opinion now considers that Eppawala phosphate is in fact of a high quality.

This deposit has for several years been exploited in a modest way by the Government-owned Lanka Phosphate Limited, which mines about 40,000 metric tons per year which it sells for the manufacture of Single Super Phosphate (SSP), a low grade but environmentally friendly fertilizer which is used by local farmers.

Controversy arose when the previous Government in 1993 decided to commence discussions with the U.S. firm of Freeport MacMoRan for the large-scale commercial exploitation of this deposit.

Freeport MacMoRan is widely regarded as one of the most unscrupulous polluters of the environment, and turned large areas of Florida into a waste land before moving abroad to continue their depredations in New Guinea and Indonesia.

The succeeding Government appointed a Negotiating Committee to continue discussions with Freeport. According to official documents in the possession of the petitioners in last week's case, there had been three rounds of negotiations from 1994 to 1996, after which Freeport had submitted a draft Mineral Investment Agreement together with other related agreements under which their allied companies would render various support services.

The Attorney-General, in consultation with the Negotiating Committee had proposed a number of amendments to the Freeport draft, said to be on the basis of the parameters laid down by Cabinet. Freeport had raised certain queries on these amendments and then, apparently losing patience, had directly approached the President to urge an early conclusion of the matter.

According to the Committee Report, the President had then directed that there should be one final round of negotiations to clear up all outstanding issues. This was held, and the report states that the draft MIA and related agreements were initialled by the Secretary to the Ministry of Industrial Development and representatives of the foreign company.

In terms of the project as envisaged, a project company was to be established which would be allowed to mine at the rate of 1.2 million metric tons of phosphate rock annually for the first twelve years of production and thereafter at a rate of 900,000 metric tons per year.

Scientists have calculated that at these rates, the existing phosphate reserves would be used up in 30 years, whereas with more sustainable development they could last for between 150 and 200 years.

The project company, Sarabhumi Resources (Pvt) Limited, was incorporated in 1998. Sixty-five per cent of its shares are held by IMC-Agrico Company, an U.S. registered partnership comprising Freeport MacMoRan and another American company known as IMC Global Incorporated. A further twenty-five per cent is held by Tomen Corporation registered in Japan, while Lanka Phosphate Limited holds the remaining ten per cent.

Legal Watch

by Nayana

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Although reports up to last September indicated that the final agreement had not been signed, one of the foreign directors of the project company stated in a press interview that he expected it to be signed before the end of this year. The Minister of Industrial Development has also indicated to Parliament that the Government intends to go ahead with the project, despite condemnation of the project by a twelve member Committee of the National Science Foundation which was asked to review the matter by the Minister for Science and Technology.

However, widespread public agitation against the project, spearheaded by local community and religious leaders and supported by trade unions, appear to have been responsible for a certain degree of hesitancy on the part of the Government to take the final steps.

The main issues of controversy relate to the massive environmental damage that has been known to result from such intensive mining operations, and the fact that this nonrenewable natural resource looks set to be exhausted within the lifetime of a single generation.

Experts who have publicly criticized the project include over a dozen of Sri Lanka's best known scientists. The National Academy of Sciences and the National Science Foundation have collectively condemned it, while other critics include Professor Tissa Vitharana, Adviser to the Ministry of Science and Technology.

All these persons emphasize that they are not against using local and foreign expertise to upgrade the present modest level of exploitation of the Eppawala deposits. They have pointed to a number of better sustainable and more environmentally friendly alternatives that have been put forward from time to time, including a proposal by the New Zealand Fertilizer Technology Group to produce 150,000 metric tons of SSP fertilizer for the local market at less than five per cent of the cost of the present project.

The present project will manufacture the higher grade and more expensive DI Ammonium Phosphate (DAP) which will be primarily for export, and the Sri Lankan farmer will have to re-purchase it, albeit with a discount on the f.o.b. price.

The manufacture of DAP also requires a much more complex and environmentally damaging process, and for this purpose a 450 acre site has been earmarked at Trincomalee for a processing plant which will produce phosphoric acid and sulphuric acid and will dispose of phospho-gypsum (said to be a radioactive substance) on the edge of Snug Cove.

According to the Negotiating Committee Report, a further 300 acres of land to the east is to be reserved for the company, and released only as and when the company decides that it is not needed. Likewise, the 56 square kilometer mining area at Eppawala is to be surrounded by a ten kilometre "buffer zone" on all sides, bringing the potentially affected area in the Anuradhapura district to about 800 square kilometers.

However, while feelings have been running high over this project, the challenge faced by the petitioners and the Environmental Foundation to whom they turned for legal assistance, was how to translate all this into a cause of action at law.

The course adopted was to institute a case on imminent infringement of fundamental rights based on the following twin premises: Firstly, that while forced relocation may be permitted for a reasonable public purpose, this project did not fit that description and the action of the Government in persisting with it even in the face of strong criticism from its own scientists, was arbitrary and unreasonable. Therefore, if carried out, it would be an infringement of the petitioners' right to pursue their chosen occupation guaranteed by Article 14(1) (g) of the Constitution and their right to freedom of movement and to choose their place of residence in Sri Lanka, guaranteed by Article 14 (1)(h).

Secondly, the provisions of the National Environment Act and the regulations framed under it require an Environmental Impact Assessment to be carried out, in which the public would be entitled to participate, before such a project could be approved. However, it was argued that in view of the Government's prior commitment to the project in all its detailed terms as set out in official documents, it was unlikely that any EIA process subsequently carried out would give a fair consideration to the submissions of the public including the petitioners.

The petitioners therefore claimed that their right to equality before the law and the equal protection of the law guaranteed by Article 12(1) of the Constitution was also about to be infringed.

The Supreme Court granted leave to proceed and also issued an order that the Mineral Investment Agreement, if signed, should be produced before Court within one week. The petitioners had asked for disclosure of the relevant agreements (of which they were only in possession of unsigned drafts) as a necessary step in the interests of justice. This order marks an important milestone in the quest for a right to information which has been a concern of many civic groups even outside the environmental sphere.

The respondents to the case, who included the main State agencies involved in the project, the affected companies and the Central Environmental Authority, have been given time to file objections, with argument fixed for March.

The papers filed by the petitioners indicate that a principal plank of their argument is going to be the public trust doctrine, namely that the Government acts as the trustee of the people in disposing of the natural wealth of this country, and must do so in a manner that takes into account the needs of present and future generations. This concept has been the subject of some recent Supreme Court decisions in India and the Philippines, as well as being mentioned in older authorities.