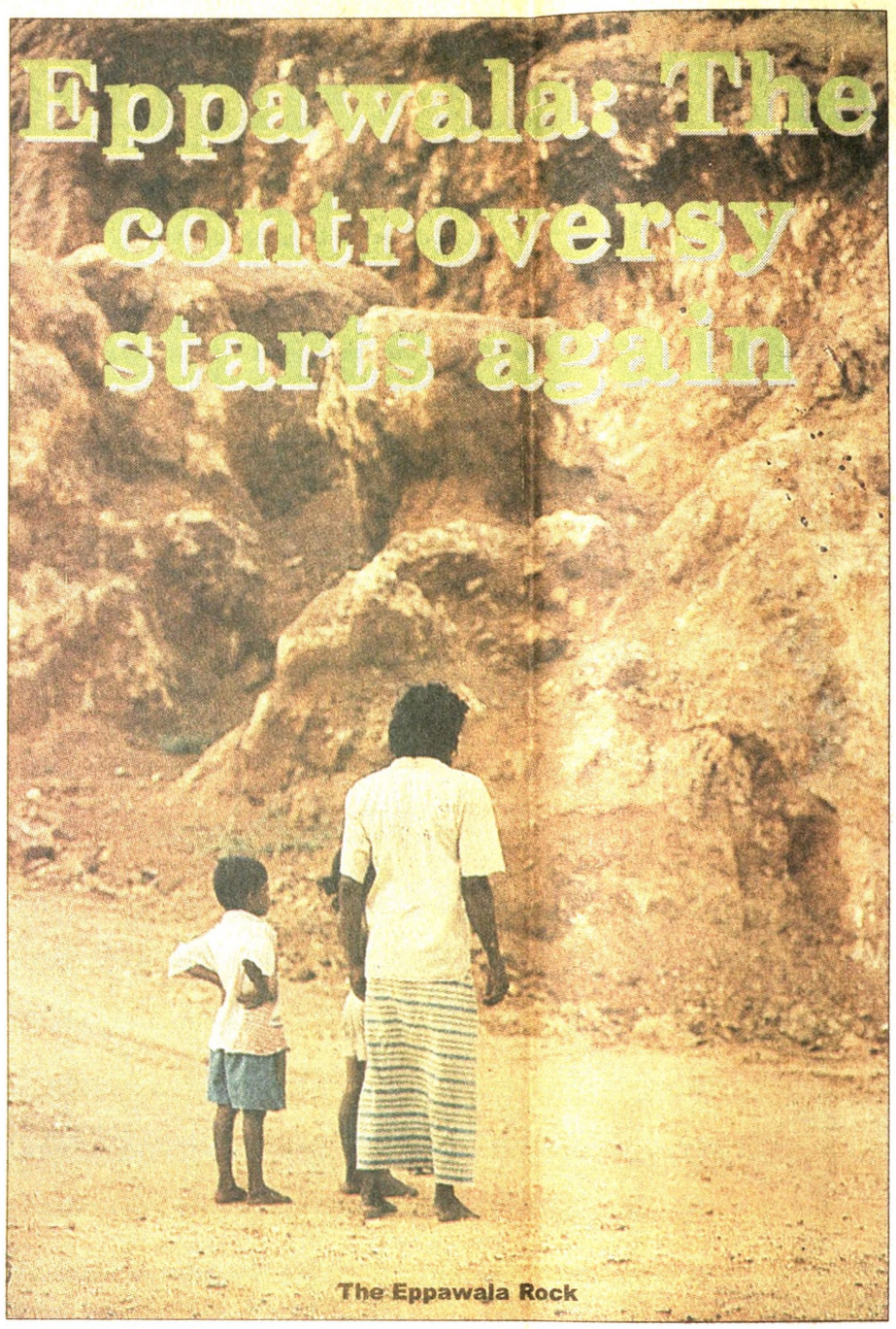
Sunday Island March 13, 2005. page 16

Eppawala: The controversy starts again



The Eppawala Rock

by Ruana Rajepakse

Officially, the case of *Bulankulama and six others versus Secretary, Ministry of Industrial Development and seven others* was a fundamental rights application by six residents and a Chief Monk of the Anuradhapura District whose lands, livelihood and temple were in danger of being adversely affected by a development project promoted by the respondents.

However its landmark status is indicated even in the Sri Lanka Law Reports whose editors usually style cases only by the names of the parties but on this occasion added in brackets the words "Eppawala Case".

In this judgment delivered on April 7, 2000, Supreme Court Justices Amerasinghe, Wadugodapitiya and Gunasekera amalgamated principles from the 1978 Constitution with internationally recognized principles relating to sustainable development and access to information. Aided by a wealth of material from concerned Sri Lankan scientists, the Court also dealt with the myth and reality of what foreign investment means in the context of environmentally degrading projects.

A report published by the National Science Foundation in 1999 sets out the scientific background. The report notes that the Phosphate deposit at Eppawala was discovered and later mapped by the Geological Survey in 1971. Initially thought to be low-grade apatite, this opinion was later revised after studies at the Institute of Fundamental Studies (IFS) revealed that Eppawala Phosphate has two components, high-grade relatively more soluble apatite crystals embedded in a matrix of lower quality apatite. IFS scientists stated that these two components could be easily segregated for processing.

Considerable value

The National Science Foundation (NSF) was of the view that Eppawala Rock Phosphate (ERP) is of considerable value to the country because Phosphate deposits, like fossil fuels, are non-renewable and dwindling natural resources. Even if more phosphate deposits were to be discovered globally, its total quantity is finite and is exhaustible in the future. A leading study by Herring and Fantel of the US Geological Survey has reported the demonstrated reserves worldwide at 12.0 Gt. and the base reserves at 37.8 Gt. These scientists estimate the lifetime of these two categories of reserves as 50 and 100 years respectively. The NSF accordingly issued this advice:

"The policy decisions to exploit ERP must be taken in the light of existing internationally published scientific findings, and the recommendations of this study. As the world's phosphate reserves will be exhausted in 150 years, it is an inescapable conclusion that the deposit must be reserved for the country's use. ERP deposit should therefore be mined to meet only the local requirements of agriculture. It would be an extremely shortsighted and faulty policy to export it. The EP apatite is a mineral resource of immense value to the country whose exploitation must be carefully planned to serve the national interests."

This phosphate deposit is located in the Anuradhapura District, in an area that is of vital importance to this country's irrigation, agriculture and archaeology. Extensive mining operations will have an adverse impact on all three.

Initially, exploitation of this resource was entrusted to a Divisional Development Council, thereafter its operations were taken over by the State-owned Lanka Phosphate Ltd. which continues to mine the phosphate under license from the Geological Survey and Mines Bureau. At the time of the court case, the company mined about 40,000 — 50,000 metric tons of rock phosphate that was distributed to fertilizer- manufacturers. It was common ground among scientists and government authorities that this output could and should be increased. However the question was by how much, and by what methods this could be done while ensuring the sustainable use of the resource for future generations and avoiding irreparable damage to the environment.

Attempts to find an international collaborator had already resulted in an offer form the New Zealand Government to set up a plant to manufacture 150,000 MT of Single Super Phosphate (SSP) annually, which is the variety required by most of Sri Lanka's agriculture. The exploration areas of the project was to be 2.5 square km and SSP production does not generate the harmful pollutants such as phosphoric acid that is a necessary by-product of higher grade phosphate products. At the proposed rate of exploitation, the known reserves would last for about 200 years. However this proposal evidently did not find favour with the governments of the 1990s.

Instead, during that same decade the government entered into negotiations with the U.S. based corporation Freeport MacMoran, whose record for large-scale pollution and environmental degradation is notorious even in its home country. The proposal of this corporation was to conduct high-intensity mining operations that were expected to yield 26.1 million MT of rock phosphate per annum and exhaust the known reserves within a period of 30 years. The operation would cover an initial exploration area of 56 square km with a 10 km buffer zone all round, bringing the potential project area up to 800sq.km.

The proposed project was to produce high grade Di Ammonium Phosphate or DAP, that is more expensive and more polluting in its manufacture and use, than Single Super Phosphate (SSP) or even Triple Super Phosphate (TSP) which is also used in Sri Lankan agriculture. According to the scientists, this country has no need for DAP except for a small quantity used in plantation nurseries.

This DAP production was to take place at a 450 acre site at Trincomalee. A necessary waste product of this manufacturing process is the generation of harmful phosphogypsum which would have accumulated at a rate of 1 million tons annually. This would have been in addition to the degradation from the high intensity mining operations at Eppawala itself, that would have left large craters and gullies that would have become breeding grounds for mosquitoes, leading to an increase in mosquito-borne diseases such as malaria, dengue, and Japanese encephalitis.

Human displacement

The potential human displacement from the project was estimated at about 2600 families or 12,000 persons. According to the agreement as drafted, the cost of such displacement was to be met by the mining company but was to be carried out by the government "in a manner which does not create an undue financial burden on the company."

The case of the Petitioners who went to court was that this project involving the disposal of a national asset at an enormous environmental cost was not for a public purpose or for the public benefit. Its principal beneficiaries were going to be two foreign shareholders who together held 90 per cent of the shares in the new company "Sarabhumi Resources (Private) Limited" that had been formed to carry out the project.

The Memorandum of Association of the project company revealed that IMC-Agrico Company (the successor in title to Freeport MacMoran) held 65 per cent of the total shareholding while Tomen Corporation of Japan held 25 per cent. The Sri Lanka government-owned Lanka Phosphate Ltd. held the remaining 10 per cent of the shares. Thus Sri Lanka which was contributing the non-renewable natural resource on which the company's operations and profits were to be founded, only got a 10 per cent shareholding.

It was also noteworthy that the allotted share capital of the new company with whom the agreement was to be signed comprised at that time a mere Rs. 58,000 (5800 shares at Rs. 10.). It is also clear from documents filed in the case that a substantial portion of the capital requirement of the project was to be met by borrowing and that unprocessed rock phosphate which was part of the non-renewable natural wealth of Sri Lanka was to be exported for 12 years in order to meet the company's debt servicing requirements. Thus while Sri Lanka's mineral wealth virtually provided the financial guarantee for the company's operations, the foreign investors risked very little but would, between them, have been entitled to 90 per cent of the dividends once the company started making a profit.

According to the NSF Report, the total capital expenditure by the investors was to be USD 425 million. As against this, the total value of the rock phosphate that was to be mined over the 30 year period, i.e. Sri Lanka's contribution to the project, was USD 673 million f.o.b. value.

In return the only direct monetary benefits to Sri Lanka would be royalties of 5.5 per cent of Morocco International price on all raw rock phosphate mined for export and used locally for DAP manufacture, amounting to USD 37 million, plus a dividend on its 10 per cent free equity over a 30 period amounting to USD 70 million. Thus in return for parting with its USD 673 million worth of non-renewable rock phosphate this country would have got a direct monetary benefit of only USD 107 million.

It was calculated that even if indirect monetary benefits such as taxes (at a concessionary rate), Ports Authority earnings, savings on fertilizer subsidies, and infrastructure benefits were added on, the total benefits would still have amounted to only USD 471.3 million — a loss compared to the value of the natural resource that would be exhausted in 30 years.

It is a sobering thought that any Sri Lanka government could have been ready to sign such a deal. A document filed in court and referred to in the judgment revealed that after Cabinet approval was given to the deal in October 1996, there were some delays caused by differences between Freeport MacMoran and the government negotiating team over the draft agreements. However, Freeport MacMoran representatives then met the government at the very highest level, after which the negotiating team comprising Treasury Secretary B.C. Perera, the then Attorney-General Sarath N. Silva, Secretary, Ministry of Industrial Development, Austin Perera, and BOI Chairman Thilan Wijesinghe were directed to conduct one final round of negotiations and clear any outstanding issues. This took place from 28 July to 4 August 1997 and the agreed documents were initialled by the Secretary, Ministry of Industrial Development and representatives of Freeport MacMoran and IMC Agrico.

The project area is traversed by the ancient Jaya Ganga / Yoda Ela scheme which is considered to be among the greatest examples of Sri Lanka's ancient engineering skills and, with its related channels and tanks, forms an important part of the integrated irrigation network of the North Central Province. Pollution to any part of this scheme could affect the whole. A shutting off of any part due to mining activities could also adversely affect the entire scheme. The modern or Nava Jaya Ganga, also known as the Kalawewa Right Bank Main Channel, cuts directly across the area of the phosphate deposit. Thus sustainable development in this context would mean not only refraining from over-exploiting the phosphate deposit but also ensuring that extraction takes place without damaging other equally important aspects of Sri Lanka's development and food security.

Surprising

This time round, the advertisement calling for expressions of interest to develop the Eppawala phosphate has been published by the Public Enterprises Reform Commission (PERC). This is surprising, since Act No. 1 of 1996 that established PERC gives it a mandate only in relation to the restructuring of public enterprises, not the disposal of natural resources. If the purpose is merely to restructure the Lanka Phosphate company, the advertisement does not make that clear.

In any event, if the Government / PERC does not want to be subject to the same kind of arm-twisting that appears to have taken place in 1996, it should first, in consultation with Sri Lankan scientists and the agricultural sector, determine the parameters of the desired development and then call for offers within those parameters. The present advertisement amounts to an open invitation to the likes of IMC-Agrico to return.

Then there is the question of first determining how much phosphate we actually have before deciding at what rate it should be exploited. That was part of the Supreme Court order which the Geological Survey and Mines Bureau admits it never carried out because it was allegedly too expensive. The National Science Foundation in its 1999 Report did not seem to think so and in fact advocated an immediate survey by the GSMB "to establish the total extent and the quality of the surface and subsurface parts of the deposit (northern and southern sections) at Eppawala".

The story looks set to end in unproductive controversy once again.