

“Sethusamudram Ship Canal Project adverse to Sri Lanka?” Legal and Environmental Impact on Sri Lanka

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Abstract- *This research aims to assess the adverse impact of Sethusamudram Ship Canal Project to Sri Lanka. India had overseas trading with many countries around the world since time immemorial. Sethusamudram Ship Canal project was proposed in order to connect the Bay of Bengal to the Gulf of Mannar, in order to reduce the steaming distance from West India to South India. Indian Government implemented the channel in India's territorial waters. Even though sovereignty was given, it need to be exercised subject to the rules of international law. As Sri Lanka also have an impact on this project India is bound to inform the Government of Sri Lanka in this regard, but Indian government had violated their obligations under the International law. Currently this project is on hold due to the protests of the Indian's on its environmental impacts and the destruction of their culturally valuable bridge Ram Seth. The objectives of this research is as follows, to identify the legal impacts to Sri Lanka, to explore the environment impacts and repercussions to Sri Lanka and assessing the legal remedies available to Sri Lanka. Even though the project has been on hold since 2009, if India is willing to continue this project, Sri Lanka can move on to legal remedies which are provided under the United Nations Law of the Sea Convention 1982. There are many adverse impacts to the environment and when considered the disadvantages surpass the advantages of this project. Therefore the implementation of this project would affect adversely to Sri Lanka and its future generations. This research would employ a quantitative analysis of primary sources and secondary sources. Primary sources would include conventions, case laws and secondary sources would include textbooks, journal articles, cases and other electronic resources.*

Key words- Sethusamudram Ship Canal Project, Legal Impact, Environmental Impact

I. INTRODUCTION

The Palk Strait separates India and Sri Lanka by a mere 30km of water. The Sethusamudram Ship Canal project (SSCP) was proposed with the intention of linking Palk bay and Gulf of Mannar between India and Sri Lanka by creating a shipping canal. It aims at cutting a canal 12.8 metres deep and 300 metres wide with a total length of

260 kilo meters. In historical times this area was used by small vessels for the purpose of fishing and trading. Big vessels travelling from Western countries and even from the west coast of India with the destination in the east coast of India and other Eastern countries have to navigate around the Sri Lankan coast. In order to reduce the steaming distance and to take the advantage of navigation on its own territorial waters, India implemented the project in India's territorial waters. Even though this project was implemented in 2004 this was firstly proposed in 1860. (P.Sivalingam, 2000) It required dredging 82.5 million cu meters of sand and rocks from the sea bed. When the work was stopped in 2009 only 33.9 million cu meters had been dredged but earlier estimated cost of US\$ 33.9 million has now been raised to US\$ 872 million.

In this article the researchers aim to discuss the environmental and legal impact of this project on Sri Lanka. One of the main concerns that have arisen is that India has failed to inform the Government of Sri Lanka which is a duty of the Indian government in international law in respect of the rights and interests of Sri Lanka's environmental impact with specific reference to the Environment Impact Assessment (EIA) carried out in regard to the proposed project and the impact on marine environment and ecological challenges presented by environmentalist in this regard. This research paper thereafter will reflect on the remedies available to Sri Lanka under United Nation Convention on Law of the Sea (UNCLOS).

II. INTERNATIONAL LAW OF THE SEA PROVISIONS RELEVANT TO SSCP

United Nations Convention on the Law of the Sea III of 1982 is the main International convention relevant to law of the sea. With regard to the SSCP there are some relevant provisions of UNCLOS. Article 2 (1) states that “The sovereignty of a coastal State extends, beyond its land territory and internal waters.....”. Even though the sovereignty is given it is not absolute according to Article 2(3) “the sovereignty over the territorial sea is exercised according to the convention and to the other rules of International Law”. Further Article 193 of the convention has recognized that “ States have the sovereign right to

exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.” According to Article 194 (1) of the convention, it states that “States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source.....”. And also Article 194(2) further recognized that “States shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.”

With regard to Article 192 it recognize that “States have the obligation to protect and preserve the marine environment.” Article 235 (1) of the convention provides that “States are responsible for the fulfilment of their international obligations concerning the protection and preservation of the marine environment.” Article 235 (3) further mentions that “With the objective of assuring prompt and adequate compensation in respect of all damage caused by pollution of the marine environment, States shall cooperate in the implementation of existing international law and the further development of international law relating to responsibility and liability for the assessment of and compensation for damage and the settlement of related dispute.....”. Therefore these Articles are some of the important provisions of the International law of the sea which are relevant to the legal impact and the environment impact on Sri Lanka with regard to the SSCP.

III. THE LEGAL IMPACT OF SSCP TO SRI LANKA

SSCP has several legal implications on Sri Lanka. Sri Lanka and India both are signatory parties to the United Nations Convention on the Law of the Sea (UNCLOS) of 1982. It is the view of the researchers that India has already violated or has attempted to violate several Articles of the UNCLOS and also the sovereign rights of Sri Lanka. It is a fact that the SSCP will be implemented within the territorial waters of India. Article 2(1) of the UNCLOS states that sovereignty of the territorial sea has been given to the coastal state. But Article 2(3) of the UNCLOS provides that “the sovereignty over the territorial sea is exercised according to the convention and to the other rules of International Law”. Therefore though India has the sovereignty within the territorial sea it is not absolute. In the implementation of the SSCP, India as a State has failed to officially inform Sri Lanka about the project and its adverse environmental impact on Sri Lanka. Article 194(2) of the UNCLOS stipulates that States have to ensure that the activities

under their jurisdiction should not cause damage to other countries. The scientific data regarding the environmental impact is unavailable to Sri Lanka. The only scientific document available to the public is the provisional executive summary of the Environment Impact Assessment (EIA) prepared by the National Environmental Engineering Research Institute (NEERI) of India. But this summary is silent on the environmental impact to Sri Lanka.

With regard to International Environmental Law there are substantive rights and corresponding obligations. UNCLOS also mentions various aspects of States substantive obligations to protect and preserve the marine environment. Thus Article 192 of UNCLOS states that “States have the obligation to protect and preserve the marine environment” and also Article 194 of the UNCLOS provides that, States should take all possible steps to prevent, reduce and control pollution of the marine environment from any sources. (Jayasundere and De Silva, 2004) India has attempted to violate the provisions of these Articles with the implementation of SSCP.

The State responsibility of India under UNCLOS in respect of the SSCP is important. According to the Convention States have a responsibility to achieve their international obligations concerning the protection and preservation of the environment and a sovereign right to exploit its natural resources. In an international maritime boundary, a State party is also responsible for the consequences of its own acts that flow beyond its jurisdiction. Therefore India has a State responsibility towards Sri Lanka with regard to the environmental impact created by the implementation of the SSCP.

With regard to the legal impact, India also deny the ‘Right to Information’ of Sri Lanka. The success of a sustainable development is dependent on making provisions for the parties which are likely to be affected by such projects; the right to have access to information and the right to be heard in opposition. Sri Lanka has a right to information about the SSCP under the UNCLOS. The convention further recognizes that State parties should share information concerning transnational marine environmental issues. The implementation of the SSCP has breached Sri Lanka’s rights so far. According to Article 235 of the UNCLOS, India has a responsibility to exercise ‘due regard’ towards the rights of Sri Lanka on the SSCP. India’s sovereign rights to implement SSCP are subjected to Sri Lanka’s rights guaranteed under International Law. The Convention further looks upon the concept of ‘Common Heritage of Mankind’ with regard to Article 136. Which no State has the sovereignty over the deep seabed area. Therefore India does not have a sovereign right to act according to their own desire on SSCP, but to consider

the opinions of other State and International Bodies. Sethusamudram Corpn.Ltd V. Rama Gopalan and another is the court case which was proceeding in the Indian Supreme Court in 2007. (SethusamudramCorpn.Ltd V. Rama Gopalan and another, [2007]) According to this case the court ordered the Indian Government to halt SSCP and to replan SSCP, considering the environmental impact and the cultural value of Rama-Seth. Therefore SSCP has led to legal impact to Sri Lanka which violates some Articles of the UNCLOS and the rights of Sri Lanka.

IV. ENVIRONMENTAL IMPACT AND REPERCUSSIONS

Article 192 of the Law of the Sea Convention 1982 states, "States have the obligation to protect and preserve environment". Both countries Sri Lanka and India are bound to act according to this provision as they are signatories to this convention. Environmental impact assessment of the SSCP was carried out by the National Environmental Engineering Research Institute (NEERI) in 1988 and the technical feasibility report was carried out on behalf of Tuticorin Port Trust (TPT). In this report they had failed to pay attention to the recent studies carried out by specialist groups on sedimentation dynamics of the project area (Palk Bay) and ignored major risk of that area's cyclone disturbances.

Even though EIA has partially analyzed the sedimentation dynamic of Adams Bridge Area of the Palk Bay, other two distinct water bodies, Gulf of Mannar and Bay of Bengal, which are governed by different forcing factors with respect to the wind and tides, which result in different wave climate and circulation pattern has not been considered. Another major fact ignored by the EIA is the character of the material excavated to plan a safe disposal site which was a mandatory requirement to plan a stable channel design. This fact become more significant as this project was implemented in an ecologically sensitive area. According to Article 15 of the Rio Declaration on Environment and Development 1992 '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.' It is clear that the EIA lack scientific certainty and as it also adversely affect Sri Lanka they need to take precautionary measures.

According to the executive summary, the Channel is to be built on a biologically rich and highly productive sea area. According to environmentalists there are 3600 species of plants and animals including 117 species of corals and 17 species of mangroves. Further the EIA report states that this area is home to rare species such as sea turtle, whales, dolphins and sea cows. Sea cow is a rare and

endangered species migrating with the changes of seasons. The late professor of humanities of Madras University, Sudarshan had warned that the Sea Cow is a species that will disappear. (www.ukessays.com, 2015) Environmentalist point out that "dredging the canal could stir up the dust and toxin that lie beneath the sea bed, affecting marine life". (Ramsethu.org, 2016) Even though the shipping lane does not pass exactly through this water, closeness of the route will damage coral reef and also will pollute the marine environment. This project could also affect the ecology of the zone which could cause changes in temperature, salinity, turbidity and flow of nutrients, leading to high tides and more energetic waves and hence coastal erosion and could affect the local sea temperature and there by alter the pattern of sea breeze and rainfall pattern. "We stand by what we said in our report that the project will not be economically and ecologically viable". Mr. Pachauri, former Chairperson of the Intergovernmental Panel on Climate Change (IPCC), appointed by former Prime Minister of India, in order to find an alternative route to implement the project. This statement and the findings of the RK Pachauri Committee highlights and warns about the serious ecological ramifications. (The Hindu, 2013)

V. LEGAL REMEDIES AVAILABLE TO SRI LANKA IN THE INTERNATIONAL ARENA ON SSCP

There are legal remedies available to Sri Lanka under the relevant laws on the SSCP, when the Government of India decide to continue the implementation without consulting the Government of Sri Lanka and having due regard to the interests and the rights of Sri Lanka. With regard to the rights granted under the UNCLOS there is also a dispute settlement procedure. Part XV of the convention deals with the applicable mechanisms to the settlement of disputes. According to Article 279 "State parties resolve their disputes by peaceful means" based on the Charter of the United Nations. Section 2 of part XV of the convention looks upon the general provisions dealing with the settlement of dispute by negotiations. Article 283 of UNCLOS provides that "when a dispute arises between state parties concerning the interpretation and application of the convention, the parties to the dispute shall proceed expeditiously to an exchange of views regarding its settlement by negotiations or other peaceful means". Therefore Sri Lanka and India can negotiate on the SSCP as a dispute settlement mechanism. Sri Lanka can point out the fact that India has not exchanged views regarding the SSCP with Sri Lanka. If India is looking at continuing the project notwithstanding the objections of Sri Lanka, Sri Lanka can move on to the compulsory procedures entailing binding decisions according to Article 287. Sri Lanka can move on to settlement of dispute by compulsory procedure through the International Tribunal for the Law of the Sea (ITLOS) established in accordance

with Annex VI, The International Court of Justice (ICJ), an Arbitral Tribunal constituted in accordance with Annex VII and also through an Arbitral Tribunal constituted in accordance with Annex VIII.

With regard to Article 290(5) of UNCLOS "A state becomes entitled of the International Tribunal on the Law of the Sea (ITLOS) for provisional measures". In the Malaysia V. Singapore case, (Malaysia V. Singapore, [2003]) Malaysia complained against Singapore over 'Land Reclamation' under Article 290(5) of the UNCLOS for provisional measures. Malaysia had serious concerns about the reclamation project carried on by Singapore. Malaysia received the order of ITLOS in respect of provisional measures in its favor. ITLOS directed Singapore not to conduct the land reclamation in a way that would prejudice the rights of Malaysia or cause harm to the marine environment of Malaysia. The ITLOS further directed the establishment of an independent experts group and the conduct of a study in respect of the effect on the land reclamation project to Malaysia. Sri Lanka can look upon provisional measures on SSCP and take action against India by complaining to ITLOS if India continue with the SSCP which has been currently been put on hold. Therefore the Government of Sri Lanka should initiate dispute settlement proceedings as set out in the Law of the Sea Convention. However, it must be clearly understood that this is not merely a legal issue and resort to such dispute settlement proceedings entail more complex political and diplomatic ramifications in the relations between Sri Lanka and India.

VI. CONCLUSION

When considering all the facts it clearly points out the adverse impacts of this project to Sri Lanka. When taking into account the legality of the SSCP, Sri Lanka has rights under the UNCLOS to have at least all the relevant information about the project. SSCP has also neglected the nature of the area which the project has implemented. According to Captain H. Balakrishna, a retired Captain of the Indian Navy, the coast between Rameswaram and Cuddalore is called the 'Cyclone Coast'. (Rediff.com, 2007) Further Indian Meteorological Department had assigned this area as a 'High Risk Probability' area. And also the Marine Scientists have identified five 'Sinkage Pits' on the Indian coast line and one of them happened to be the Palk Strait. (Rediff.com, 2007) On the other hand when sailing at the SSC the ships cannot speed because they are sailing on shallow water.

With regard to all the circumstances mentioned above, Sri Lanka as a State has rights under the UNCLOS to compel India to get the relevant information regarding the SSCP before India continues the project once again. In the future if India does not conform to the request of Sri

Lanka, then Sri Lanka does have the option to move to the International Court of Justice or to the International Tribunal for the Law of the Sea for the necessary directives. According to the UNCLOS only the sovereign State of Sri Lanka can take action, individuals and other parties do not have a right to take action regarding SSCP. The right to take action under UNCLOS does not provide a space for 'Public Interest Litigation'. Therefore the civil society can only compel the State to take whatever necessary steps to safeguard the rights under the convention. If SSCP continues in the future, it will affect our future generations and our nation with its adverse impacts. Therefore the most suitable solution Sri Lanka has is the dispute settlement mechanism to refrain from the adverse impacts of SSCP.

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