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The Role of Environmental Impact Assessment Report in Ensuring the Sustainable Development in Sri Lanka

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Abstract

National Environment Act evolved in order to ensure and guarantee that the development projects are carried out in compliance with the notion of sustainable development. The Amendments to the National Environment Act, Amendment No 56 of 1988 and the Amendment Act No 53 of 2000 Part IVC titled approval of projects introduced a special criteria for approval and grant of license to implement and embark on the development projects which has a huge impact on the environment. Environmental Impact Assessment Report (EIAR) / Initial Environmental Assessment Report (IEAR)is a mandatory requirement which should be submitted by the project proponent to the project approving agency if he is willing to engage in development projects that is going to impact on the environmental quality. The Sri Lankan judiciary also has recognized the vital role of submitting the EIAR/IEAR in order to ensure that the development projects are in compliance with the notion of sustainable development. The primary objective of the paper is to analyze the significance of the EIAR/IEARR in promoting the sustainable development in Sri Lanka. The secondary objectives include also to analyze the legislative evolution of the requirement of EIAR/IEER for development projects to analyze the role of judiciary of Sri Lanka in recognizing the vital importance of these environmental reports. The paper employs the black letter of law where the constitutional provisions and Legislative enactments such as National Environment Act and decided cases in Sri Lanka are used as primary sources and scholarly articles on the topic are used as secondary sources. The paper finds that the Sri Lankan judiciary has played a Herculean task in upholding the sustainable development by ensuring that EIAR/IEER should be submitted before embarking on the projects which could have an impact on the environment to ensure the projects are environmentally viable. The paper concludes if a nation to thrive, environment

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preservation cannot be singled out from the development and the duty of citizens is to abide by the laws which are aimed at protecting and preserving the nature and its riches.

Keywords: *Economic Development, Environmental Impact Assessment Report, Environment, Judiciary, Sustainable Development*

Introduction

National Environment Act No 56 of 1988 by introducing a new part IVA titled "ENVIRONMENTAL PROTECTION", a new part IVB titled "ENVIRONMENTAL QUALITY" and a new Part IVC titled "APPROVAL OF PROJECTS" addressed the gap which hitherto existed in relation to environmental preservation. Under the new part IVC "Approval of Projects" requires the project proponent to submit either IEER/EIAR as the case may be before embarking on their project. The research confines its scope to the Sri Lankan context, focusing on EIAR and their role in ensuring sustainable development through the judiciary. The paper strives to engage in defining the notion sustainable development through decided cases laws. Also the paper gives an insight as to the legislative evolution of EIAR. Research problem of the paper expresses that despite the EIAR/IEER is required to be submitted before embarking on a development project which could have an impact on environment, to which extent the procedure would promotes and enhances the sustainable development?

Methods and Methodology

The research paper utilizes the black letter approach to law as the fundamental methodology. By adopting black-letter approach of law in the research the paper aims to delve into an in-depth analysis of the law in the text, including legal provisions. National Environment Act and decided cases in Sri Lanka on EIAR/IEER constitute primary sources and scholarly articles on the topic constitute secondary sources.

Sustainable Development

The Bruntdland Report which was submitted by the Bruntdland Commission provided a definition to the notion of "sustainable development" for the very first time in the history. It defined the term as "fulfilling the needs of the present generations without compromising the needs of the future generation".[1]

In *Dahanu Taluka Environmental Protection Group and Ors v Bombay Suburban Electricity Supply Co Ltd and Ors*[2] held that "the concerned Government should consider the importance of public projects for the betterment of the conditions of living people on one hand and the necessity for preservation of social and ecological balance and avoidance of deforestation and maintenance of purity of the atmosphere and water free from pollution on the other in the light of various factual, technical and other aspects that may be brought to its notice by various bodies of laymen, experts and public workers and strike a balance between the two conflicting objective. Where the status quo of the environment is shackled it may lead to a significant detrimental effect on the health, socio-economic conditions of the human. The present generation also bears the responsibility to protect and preserve a quality environment to the future generation, through reasonable legislative and other measures."[3]

In *Vellore Citizen Welfare Forum v Union of India* case observed that "the balance between environmental protection and developmental activities could only be maintained by strictly following the principle of sustainable development".[4] The notion was defined in M.C Meheta v Union Of India " a development strategy that caters the need of the

[1] United Nations Report of the World Commission on Environment and Development Our Common Future 1987 avaialble at<file:///C:/Users/Just/Downloads/our_common_futurebrundtlandreport1987.pdf> accessed 27th October 2023

[2] Dahanu Taluka Environmental Protection Group and Ors. Vs. Bombay Suburban Electricity Supply Co. Ltd. & Ors (1991) 2 SCC

[3] Dahanu Taluka Environmental Protection Group and Ors. Vs. Bombay Suburban Electricity Supply Co. Ltd. & Ors (1991) 2 SCC 539

[4] Vellore Citizen Welfare Forum v Union of India [1996]5 SCC 647

present without negotiating the ability of upcoming generations to satisfy their needs. The strict observance of sustainable development will put us on a path that ensures development while protecting the environment, a path that works for all people and for all generations. It is a guarantee to the present and bequeath to the future".[5] "All environmental related developmental activities should benefit more people while maintaining the environmental balance. This could be ensured only by the strict adherence of sustainable development t without which life of coming generations will be in jeopardy".[6]

Justice Ngcobo in *Fuel Retailers Association of Southern Africa v Director General Management Mpumalanga Province and others* adumbrated "development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment shall create devastating impacts on development promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked".[7]

It is obvious that development and environmental protection and preservation are linked and interconnected to each other and could not be singled out. Adherence of the sustainable development principle is essential for maintaining a golden balance between the right to environment and right to development. As per Justice Weeramantry "Development can only be prosecuted in harmony with the reasonable demands of environmental protection. It is thus the correct formulation of the right to development that right does not exist in the absolute sense, but is relative always to its tolerance by the

[5] M.C.Meheta v Union of Inida [2002]4 SCC 356
[6] Ibid
[7] Fuel Retailers Association of Southern Africa v Director General Environmental Manangement, Department of Agriculture, Conservation and Environment Mpumalanga Province and Others 4 (CCT 67/06)[2007] ZACC 13: 2007(10) BCLR 1059(CC) [2007](6) SA 4 (CC)(07 JUNE 2007), para 44

environment. The right to development as thus refined is clearly part of modern International Law".[8]

Legislative Evolution of EIAR

Chunnakam case[9] Justice Prasanna Jayawardana PC explained how the National Environment Act was evolved so as to ensure that the development projects were carried out in compliance with the concept of sustainable development and how the legislature brought the necessary changes to the National Environment Act to introduce prerequisites to get environmental clearance license. "Objective of enacting the National Environmental Act No. 47 of 1980 was to establish the, Central Environmental Authority (CEA) with the powers, functions and duties of making recommendations relating to national environmental policy and the conservation of natural resources and engaging in related research, educational and advisory activities. However, the Act did not invest the CEA with the power or a duty to effectively control pollution and degradation of the environment or to prevent persons from engaging in activities which pollute or degrade the environment. This lacuna in the aforesaid Act was felt with the shift to a more open economy in the 1980s and an increase in the number of industries and projects which could affect the quality of the environment.

This gap was rectified, to an extent, by the enactment of the National Environmental (Amendment) Act No. 56 of 1988 and the National Environmental (Amendment) Act No. 53 of 2000. These amending acts conferred on the CEA the additional powers, functions and duties of, coordinating all regulatory activities relating to the discharge of wastes and pollutants into the environment and the protection and improvement of the quality of the environment; regulating, maintaining and controlling sources of pollution of the environment;

[8] Justice Weeramantry in Gabcíkovo-Nagymaros Project Case, (Hungary v Slovakia) 1997 I.C.J. 3

[9] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015

requiring the submission of proposals for new projects and changes in existing projects for the purpose of evaluating their impact on the environment; and requiring local authorities to comply with and give effect to recommendations relating to environmental protection and the prohibition, prevention or control of environmental pollution".[10]

The necessary changes brought to the Act was then discussed by the Justice Jayawardana. "In pursuance of these additional powers, functions and duties conferred on the CEA, the aforesaid Act No. 56 of 1988 introduced a new Part IVA titled ENVIRONMENTAL PROTECTION, a new Part IV B titled ENVIRONMENTAL QUALITY and a new part, Part IVC tilted APPROVAL OF PROJECTS".[11]

Part IV A of the National Environmental Act, as amended, contains provisions which prohibit the carrying on of any activities which cause pollution [termed "prescribed activities"] except under the authority of an EPL and in compliance with the terms, standards and conditions which are specified in that EPL and which are specified in the Act and regulations made under the Act.[12]

"Part IV C of the Act introduce a special procedure for granting approval to implement projects which, in very general terms, may be described as being either:

(i) Specified types of large scale projects which, by the nature and magnitude of the scale of their operations, are likely to have a significant effect on the environment; or

(ii) Specified types of projects of whatever magnitude which are located in or near areas identified to be environmentally significant or sensitive. Both types of projects are termed "prescribed projects" in Part IV C of the Act".[13]

[10] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 pg 12-13
[11] Ibid 9
[12] Regulatory framework relating to EPL Extra Ordinary 2264/18dated 27.01.2022 and rescinded the then Gazette Extraordinary No. 1533/16 dated 25.01.2008
[13] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 13

IEER and EIAR

The importance of insisting on the EIAR/IEAR before embarking or permitting the project is highlighted in Principle 17 of the Rio Declaration which states "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority."[14]

National Legal Framework Dealing with EIAR

According to Section 33 of the National Environment Act Environmental Impact Assessment Report (EIAR) is defined so as to mean "a written analysis of the predicted environmental project and containing an environmental cost-benefit analysis, if such an analysis has been prepared, and including a description of the project, and includes a description of the avoidable and unavoidable adverse environmental effect of the proposed prescribed project ,a description of alternative to the activity which might be less harmful to the environment together with the reasons why such alternatives were rejected, and a description of any irreversible or irretrievable commitments of resources required by the proposed prescribed project".

Section 33 of the Act also defines "Initial Environmental Examination Report"(IEER), a written report wherein possible impacts of the prescribed project on the environment shall be assessed with a view to determining whether such impacts are significant, and as such requires the preparation of an environmental impact assessment report and such report shall contain such further details, descriptions, data, maps, designs and other information and details as may be prescribed by the Minister"

Part IV C of the National Environmental Act, No. 47 of 1980, introduced by amending Act No. 56 of 1988.

[14] United Nations Rio Declaration available at <https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf >accessed on 27th October

Section 23AA requires that approval be obtained for the implementation of all "prescribed projects", from the appropriate project approving agencies.[15] Section 23 Y "For the purposes of this Part of this Act, the Minister may by Order published in the Gazette specify the state agencies (hereinafter in this Part referred to as "project approving agencies") which shall be the project approving agencies[16]. Section 23Z The Minister shall by Order published in the Gazette determine the projects and undertakings in respect of which approval would be necessary under the provisions of this Part of this Act".[17]

Sub section 1 of Section 23 BB enshrines that "it shall be the duty of all projects approving agencies to require from any Government Department, Corporation, Statutory Board, Local Authority, Company, Firm or individual who submit any prescribed project for its approval to submit within a specified time an initial environmental examination report or an environmental impact assessment report as required by the project approving agency relating to such project and containing such information and particulars as may be prescribed by the Minister for the purpose". Under section 23BB states "for the purposes of granting such approval, project approving agencies are required to call for an Environmental Impact Assessment Report (EIAR), which is defined in section 33"

Section 23BB (2) "A project approving agency shall on receipt of an environmental impact assessment report submitted to such project approving agency in compliance with the requirements imposed

[15] Notwithstanding the provisions of any other written law, from and after the coming into operation of this Act, all prescribed projects that are being undertaken in Sri Lanka by any Government Department, Corporation, Statutory Board, Local Authority, Company, Firm or an individual will be required to obtain approval under this Act for the implementation of such prescribed projects

[16] PAA are listed in the Gazette Extra Ordinary No 859/14 of 23rd February 1995available at <https://www.cea.lk/web/images/pdf/eiaregulations/reg859-14.pdf> and Gazette Extra Ordinary No 1373/6 of 29th December 2004 available at https://www.cea.lk/web/images/pdf/eiaregulations/1373_20_20_20E.pdf accessed

[17] The prescribed projects are listed in the Gazette No 772/22 of 24th June 1993,available at <https://www.cea.lk/web/images/pdf/eiaregulations/reg1104-22.pdf>, 1104/22 of 5th November 1999 and 1108/1 of 29th November 1999

under subsection (1), by Notice published in one newspaper each in the Sinhala, Tamil and English language, notify the place and times at which such report shall be available for inspection by the public to make its comments, if any, thereon".

Section 23 EE deals with alternations being made to the project. It enumerates "where any alterations are being made to any prescribed project for which approval had been granted or where any prescribed project already approved is being abandoned, the Government Department, Corporation, Statutory Board, Local Authority, Company, Firm or individual who obtained such approval, shall inform the appropriate project approving agency of such alterations, or the abandonment as the case may be, and where necessary obtain fresh approval in respect of any alterations that are intended to be made to such prescribed project for which approval had already been granted" proviso to the section states that "Provided however, where such prescribed project that is being abandoned or altered is a project approved with the concurrence of the Authority, the Authority should also be informed of it and any fresh approval that need to be obtained should be given only with the concurrence of the Authority".

Section 23(4) of National Environment Act states "where approval is granted for the implementation of any prescribed project, such approval shall be published in the Gazette and in one newspaper each in Sinhala, Tamil and English languages".

It is apparent from the statutory and regulatory framework that the submission and consideration of an IEER or EIAR [as the case may be] is a sine qua non for a "project approving agency" to consider granting approval to implement a "prescribed project".

Public Participation and EIAR

Section 23BB(3) of the National Environment Act enumerates, "any member of the public may within thirty days of the date on which a notice under subsection (2)of section 23BB is published make his or its comments, if any, thereon to the project approving agency which published such notice, and such project approving

agency may, where it considers appropriate in the public interest afford an opportunity to any such person of being heard in support of his comments, and shall have regard to such comments and any other materials if any, elicited at any such hearing, in determining whether to grant its approval for the implementation of such prescribed project".

As per Justice Jayawardana "This is an important right vested in the residents of the area where a "prescribed project" is to be located, who are the persons who will be directly affected by that project. They are given the right to state their views and have them considered before a "prescribed project" is approved. In fact, this right extends to all members of the public who have concerns regarding the environmental impact of a "prescribed project".[18] This stage involves the process by which the concerns of local affected persons and others who have plausible stake in the environmental impacts of the project or activity are ascertained with a view of taking into account all the material concerns in the project or activity design as appropriate."[19]

Section 23BB (2) to 23BB (5) in Part IVC of the Act stipulate that, "once an EIAR relating to a "prescribed project" is submitted, the public must be notified that the EIAR can be inspected and that any member of the public is entitled to submit his comments on the EIAR. A person who submits his views is entitled to be heard, where appropriate. The project approving agency has a duty to consider the views of the public when deciding whether to grant approval for the implementation of the "prescribed project". Notice of approval granted for the implementation of a "prescribed project" must be published. Where the project approving agency requires the submission of only an IEER by the project proponent, the IEER is deemed to be a public document and is open to inspection by the

[18] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 48
[19] Ibid

public".

In the case *Company Secretary of Arcelormittal South Africa Ltd and Another v Vaal Environmental Justice Alliance* where the following was stated: "First, the world, for obvious reasons, is becoming increasingly ecologically sensitive. Second, citizens in democracies around the world are growing alert to the dangers of a culture of secrecy and unresponsiveness, both in respect governments and in relation to corporations. It is clear, therefore, in accordance with international trends, and constitutional values and norms, that our legislature has recognized, in the field of environmental protection, inter alia the importance of consultations and interaction with the public. After all, environmental degradation affects us all. One might rightly speak of collaborative corporate governance in relation to the environment"[20]

It is a trite law that the right to freedom of expression, public debate and the ability to participate in public debates without fear is a sine qua non in any democratic society. Principle 10 of Rio Declaration [21]enumerates that "environmental issues are best handled with 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, including information on hazardous materials and activities in their communities, 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".

Article 1 of the Convention on Access To information, Public Participation in Decision Making and Access to Justice in Environmental

[20] Company Secretary of Arcelormittal South Africa Ltd and Another v Vaal Environmental Justice Alliance (69/2014) [2014] ZASCA 184
[21] Ibid 14

(Aarhus Convention)[22] which deals with the objectives enumerates that "in order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention". Article 4 emphasizes the "Access to environmental information where each Party shall ensure that, subject to the following paragraphs of this article, public authorities, in response to a request for environmental information, make such information available to the public, within the framework of national legislation, including, where requested"[23]

The UN Guiding Principles on Business and Human Rights stresses that "States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations. Furthermore, in meeting their duty to protect, States should enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps". It also outlines that "private actors and business enterprises have a responsibility to respect human rights, which requires them to avoid infringing on the human rights of others, to address adverse human rights impacts with which they are involved but also carry out human rights due diligence. The responsibility to respect human rights is a global standard of expected conduct for all business enterprises wherever they operate"[24]

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[22] Convention On Access To Information, Public Participation In Decision-Making And Access To Justice In Environmental Matters Available at <https://unece.org/DAM/env/pp/documents/cep43e.pdf >Accessed 27th October 2023

[23] Ibid

[24] UNHR Office of the High Commissioner, UN Guiding Principles on Business and Human Rights,Implementing the UN Protect, Respect, Remedy Framework Available at <https://www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf > accessed 27th October 2024

Freedom of expression is considered a fundamental right and value under national law and in the international arena it is considered to be an important human right. The ability to express oneself and engage in the interchange of ideas fosters a pluralistic and healthy democracy by generating fruitful public discourse and corresponding public participation in civil society[25].

SANDU v Minister of Defense the importance of the right was stated as follows: "freedom of expression lies at the heart of a democracy. It is valuable for many reasons, including its instrumental function as a guarantor of democracy, its implicit recognition and protection of the moral agency of individuals in our society and its facilitation of the search for truth by individuals and society generally. The Constitution recognizes that individuals in our society need to be able to hear, form and express opinions and views freely on a wide range of matters"[26].

Public participation in administrative and legislative decision-making has become an integral and important aspect of environmental governance in many democratic countries, however, striking a good balance between democratic participation and administrative efficiency presents challenges for many governments.

Galle Face Green case held that "although the right to information is not specifically guaranteed under the Constitution as a fundamental right, the freedom of speech and expression including publication guaranteed by Article 14(l)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain[27]. It should necessarily be so where the public interest in the matter outweighs the confidentiality

[25] Ontaria Ltd v Pointes Protection Association [2020] 2 SCR 587
[26] South African National Defence Union v Minister of Defence and Another CCT 27/98 [1999]ZACC 7
[27] Environmental Foundation Limited v Urban Development Authority of Sri Lanka and others [2009] 1 SRIL.R.123

that attaches to affairs of State and official communications."[28]

Role of Sri Lankan Judiciary in Recognizing EIAR

It is noteworthy to mention the role of Sri Lankan judiciary in identifying the vital role of IEER/EIAR in promoting and enhancing sustainable development. The following analysis will exemplify that the decided cases in Sri Lanka recognized the legal stance relating to environmental clearance where the courts rejected the view of an ex post facto environmental clearance and insisted that before embarking on the project, project proponent should submit IEER/EIAR as the case may be and If EIAR/IEER is withheld for whatever reason there would be no conditions that would safeguard the environment. Moreover, if IEAR/EIAR is to be ultimately refused, irreparable harm would cause to the environment. Johannesburg Principles on the Role of Law and Sustainable Development 2002[29] emphasizes that "an independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law, and that members of the Judiciary, as well as those contributing to the judicial process at the national, regional, and global levels are crucial partners for promoting compliance with, and the implementation and enforcement of international and national environmental law".

In *Eppawala case*[30] the petitioners were the residents of Eppawela Area,engaged in cultivation and owning lands there, one of whom was the Viharadhipati of a temple, complained of infringement of their rights under Articles 12(1), 14(l)(g) and 14(1)(h) of the Constitution by reason of the proposed agreement. They relied on the analysis of several professional experts and reports of the

[28] Ibid

[29] The Johannesburg Principles on the Role of Law and Sustainable Development adopted at the Global Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002 available at <https://www.eufje.org/images/DocDivers/Johannesburg%20Principles.pdf> accessed 27th October

[30] Bulankulama and Others v Secretary Ministry of Industrial Development and others [2000]3 SLR 243 at p.315

National Academy of Science and the National Science Foundation who were of the opinion that the proposed agreement will not only be an environmental disaster but an economic disaster. Petitioner's contention was that "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. Justice Amerasinghe adumbrated, Guide for Implementing the EIA Process, No. 1 of 1998 issued by the CEA states "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."

In *Chunakkam case*[31] the petitioner complained that the "Company operated a thermal power station in Chunnakam in a manner which polluted groundwater in the Chunnakam area and made groundwater unfit for human use. The petitioner accused the Central Environment Authority, the Ceylon Electricity Board, the Provincial and Local Authorities, The Board of Investment Sri Lanka and the National Water Supply and Drainage Board, who are named as the 1st to 7th Respondents and 10th and 11th added respondents, of having failed to enforce the law against the 8th Respondent and of having failed to stop the 8th Respondent polluting groundwater and having failed in their duty to act in the best interests of the public. The petitioner stated that, the Respondents have violated the fundamental rights guaranteed to the petitioner and to the residents of the Chunnakam

[31] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 3

area by Articles 12 (1) of the Constitution".[32]

It was held that "EIAR is, in a nutshell, a comprehensive report which sets out a detailed description of the "prescribed project", identifies its avoidable and unavoidable adverse environmental effects, assesses the possible alternatives which might be less harmful to the environment, sets out reasons why such alternatives have been rejected, describes the resources which are required and must be committed to the "prescribed project" and contains, where available, an environmental cost-benefit analysis etc"

In *Chunakkam case*[33] the stage at which a project proponent who wishes to embark on a prescribed project must obtain approval from the project approving agency for the implementation of the project was settled. In this connection, section 23AA in Part IVC of the Act states that a project proponent "will be required to obtain approval under this Act for the implementation of such prescribed projects. Thus, the term "implementation" used in section 23AA would include any work on the physical implementation of the project from the stage of groundwork on the site and its environs onwards. This view is supported by clause 5 and 6 of the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 which require that a project proponent who wishes to embark on a "prescribed project" must apply for approval under Part IVC "as early as possible". As stated earlier, an IEER or EIAR must be thereafter submitted by the project proponent and the "prescribed project" has to be evaluated by the project approving agency and the CEA to determine its likely impact on the environment. Provision is made for the public to have their say where a "prescribed project" may have a significant impact on the environment and an EIAR has been submitted. The project approving agency can grant or refuse approval for a "prescribed

[32] Ibid

[33] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 17

project" only after these steps are taken. These safeguards would be lost if the proponent is allowed to proceed with the physical work required for the project prior to or pending the grant of approval. Thus, there can be no doubt that, in the case of "prescribed projects", approval under Part IV C of the Act must be obtained from the project approving agency prior to the commencement of any form of groundwork on the project or other activity which could have an effect on the environment"[34].

Colombo Katunayake Expressway case held that "Sections 23AA and 23BB of the National Environmental Act No.47 of 1980 amended by Act No.56 of 1988 adequately protect the public interest in regard to environmental considerations by preventing the implementation of a project until an EIA is submitted and approved obtained. There will thus be a further opportunity for all interested persons to raise their objections when the amended EIA is made available for public scrutiny".[35]

In *Heather Therese Mundy v Central Environment Authority*[36] dealt with construction of Southern Express way which linked Colombo to Matara and under and in terms of sections 23Y, 23Z and 23BB of the National Environment Act No.47 of 1980 as amended by Act No.56 of 1988 and the relevant regualtions and orders made thereunder, the Expressway was a prescribed project for which the approval of the project approving agency was required and an EIAR was an essential pre condition to the approval. The Road Development Authority (RDA) was the project proponent, and the Central Environmental Authority (CEA) was the project approving agency. The RDA submitted an EIAR, prepared by the University of Moratuwa, to the CEA. The main two issues as formulated by the Court of Appeal were.

[34] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 17

[35] Amarasinghe and others v Attorney General and others (1993) 1 SLR 394

[36] Heather Therese Mundy v Central Environment Authority CA Application 688/2002

1. Whether the CEA approved the Combined Trace in the EIAR and whether the RDA attempted to deviate from the approved Combined Trace.

2. Whether the approval of the CEA was necessary for the Final Trace as it deviated from the Combined Trace

The court held "the first issue affirmative and answering the second issue held "the Final Trace was not an alteration that would come under Regulation 17(i)(a) and section 23EE and concluded that the deviations did not amount to alterations, giving several reasons, the first being: the question arises as to what is meant by an alteration. It possibly could not mean that every alteration needs a supplementary Environmental Assessment Report. For example Environmental Impact Assessment recognizes certain areas that need further study and one such area refers to sections of the highway that need to be elevated. Such decision could be decided when the project is in operation. Could it be argued that for each such alteration an EIA is required as it is not encompassed in the EIAR? The approval states that 'the developer shall comply with any additional conditions that may be communicated from time to time by the CEA during the execution of the project'. Is it logical to infer that any condition which differs from the assessments and evaluations in the EIAR requires approval?"[37]

The Court of Appeal also dealt with the Appellant's contentions that the Final Trace was not within the corridor studied in the EIAR: "But the EIAR makes several references to the Bandaragama Divisional Secretariat of which both Weedagama and Gelanigama are included. The EIAR specifically states that a systematic sampling procedure was not followed in selecting households for interviews. An attempt was made to get a cross section. Therefore the specific areas in which the [Appellant/s] are resident may not have been covered by the EIAR. Nevertheless, most of the areas in which the claim to be

[37] Ibid

resident were specifically studied during the Environmental Impact Assessment."

Supreme Court reversed the decision of the Court of Appeal Answering the issue, Did the deviations at Bandaragama and Akmeemana constitute "alterations" within the meaning of section 23EE of the Act, Regulation 17(i)(a), and condition III held that it is unnecessary to decide whether minor changes not adversely affecting anyone, changes necessitated by unforeseen circumstances after the commencement of a project, etc, amount to alterations. Here the changes were substantial, as the Judicial Committee too found; they adversely affected the Appellants and their property rights; they were changes in respect of the route of the Expressway, and the route was a principal component of the project; and they were changes proposed before the commencement of the project. The purposes of Environmental Impact Assessment as explained by the Court of Appeal itself would not be achieved if, contrary to the ordinary meaning of the word, such changes are treated as not being alterations. Indeed, those purposes would be defeated if the project proponent itself the potential infringer was allowed to decide whether such changes were environmentally objectionable or not, without reference to the CEA and held finally the change constitutes "alterations"[38]

The legal status as to the stage in which the environmental clearance should be obtained was concluded in Chunakam case[39], thus, there can be no doubt that, in the case of "prescribed projects", approval under Part IV C of the Act must be obtained from the project approving agency prior to the commencement of any form of groundwork on the project or other activity which could have an effect on the environment.

[38] SC Appeal 60/2003

[39] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 18

EIAR vis a vis Sustainable Development

In *Heather Therese Mundy v Central Environmental Authority*[40] the Court of Appeal observed that "the very purpose of Environmental Impact Assessment is to ensure that development options under consideration are environmentally sound and sustainable, and that the environmental consequences are recognized and readily taken into account early in the project design.

This process fosters sound decision-making as it enables decision-makers to consider all relevant environmental consequences and afford affected persons an opportunity to voice their opinion. It fosters dialogue between decision-makers and involved parties, which is an essential pre-requisite of any development project for such project to have sustainability over a long period".[41] Also the Court of Appeal stressed that "Courts have to balance the right to development: and the right to environmental protection. While development activity is necessary and inevitable for the sustainable development of a nation, unfortunately it impacts and affects the rights of private individuals, but such is the inevitable sad sacrifice that has to be made for the progress of a nation".

In *Chunnakam case*[42] Jayawardana PC held that "it is very clear that the provisions of the National Environmental Act are designed to promote sustainable development and that there is a duty placed on the Central Environment Authority to ensure sustainable development as far as is practical and possible. It is evident that the processes and procedures set out in Part IV C the Act and the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 which stipulate that prior approval must be obtained for the implementation of a "prescribed project" with the submission and consideration of an IEER or EIA, are designed

[40] Heather Therese Mundy v Central Environmental Authority CA Application 688/2002, SC Appeal 59/2003

[41] Heather Therese Mundy v Central Environmental Authority, SC Appeal 59/2003 Per Fernando J quoting the COA judgment

[42] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 page 51

to enable the CEA and BOI to promote sustainable development. Thus, a failure on the part of the CEA and the BOI to duly perform those duties and duly exercise those powers will amount to breach of the statutory duty placed on the CEA and the BOI to promote and ensure sustainable development".[43]

Conclusion

EIAR held to be a fundamental aspect in promoting sustainable development, which balances both right to environment and right to development. EIAR/IEAR is granted on the condition of the suitability of the site to set up the project from the environmental point of view, and existence of necessary infrastructural facilities and equipment for compliance of environmental norms. So it is a well settled law that before embarking on development projects, the project proponents to submit IEER EIAR as the case may be, to the project approving agencies and the project approving agencies shall approve or dismiss the issuance of license to initiate the project based on the environmental impact.

[43] Ravindra Gunawardana Kariyawasam v Central Environmental Authority SC FR Application No. 141/2015 pg 51-52