

**Sovereignty vs. trans-boundary environmental harm:  
The evolving International law obligations and the  
Sethusamudram Ship Channel Project**

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## **Acknowledgements**

The present paper address a topic, which has recently experienced an explosion of new developments and gained enormous importance to small developing nations like Sri Lanka. It has enabled States that may be affected by environmentally degrading activities of other States to take safeguard actions in a successful manner. Furthermore this evolving new law of international responsibility attempts to strike a careful balance between international environmental protection and the principle of territorial sovereignty.

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# **Sovereignty vs. trans-boundary environmental harm: the evolving International law obligations and the Sethusamudram Ship Channel Project**

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## Introduction

The island State of Sri Lanka is barely thirty kilometres away from India's southern coastal tip. Over the years both States shared common interest in keeping the region free from conflict. In fact, in June 1974 India and Sri Lanka signed bilateral agreements on their common boundary in the historic waters and on the maritime boundary in the Gulf of Mannar and the Bay of Bengal in March 1976. However the purpose of this paper is to examine the legal concepts relevant to the implications arising for Sri Lanka from the Indian Government's huge flagship project of SethuSamudram Ship Channel (SSCP), which has generated great controversy in the region. The Indian Government launched the project on 2 July 2005 with the purpose of constructing a navigation channel through the shallow waters of Palk Strait and Adams bridge area linking the Gulf of Mannar and the Bay of Bengal.

The litany is that the project has far reaching strategic, economic and ecological implications for Sri Lanka. In fact, Sri Lanka's concerns were conveyed to India without much success at various levels. Since the Government of India has now chosen to implement the Project on the Inrment'sc- ng a navi7m9Tw-4 TD2 fact,c0.0iu topaper

The Gulf of Mannar, lying between the two States is considered to be one of the biologically richest coastal regions of the world and Sri Lanka fisheries have been dependent on this area for centuries. Hence, Sri Lanka's concern for the fishery resources stems from this realization that the livelihoods of northern and northwestern fishing communities of Sri Lanka are entirely dependent on fishing activities in the affected area.

The shallow waters in the area have ensured minimal pollution due to the lack of ship traffic, but the dredging of the canal could easily destroy the ecosystem by opening up the Palk Bay and the Gulf of Mannar.

Furthermore, the very high amount of anticipated dredged material is a cause for

project to be executed in his homeland<sup>3</sup>. Indian Blue water Navy has also been dreaming of the canal for a long time. For the navy, such a canal means security by filling the vital strategic gap around India's coastline created by the geographical location of Sri Lanka and necessitating circum- navigation when naval craft move between East and West India.

Hitherto, Sri Lanka has been exploiting the strategic location for the development of the Colombo Port as the hub for South Asia. Geographically, the Colombo Port's pre-eminent position, almost equidistant to both the west and east coasts of the sub-continent, has become attractive to both Indian shippers and importers and the main line ships plying east-west trade routes and sailing past the island.

However, despite the economic potential impact of the SSCP on Sri Lanka's port development and transshipment business, it cannot be used as a legitimate grievance or negotiable demand in Sri Lanka's representations to India.

Given the trans-boundary nature of the environmental impacts of Sethusamudram Ship Channel Project, which goes beyond the territory of the Proponent State – India, Sri Lanka should have been involved as a key stakeholder in the entire process.

In fact, growing interdependence between States is giving rise to the increasing development of rules to deal with International environmental responsibility and trans-boundary environmental risks associated with human activity, including substantive rules for international co-operation and rules for dealing with disputes that arise between States.

In contemporary public international law, the concept of absolute territorial sovereignty is no longer recognized. Consequently, the scope for discretionary action arising from the principle of territorial sovereignty is determined by such principles and adages as 'good neighbourliness' and *sic utere tuo ut alienum non*

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*laedas* (you should use your property in such a way as not to cause injury to your neighbour's) as well as by the principle of State responsibility for actions causing transboundary damage, and more importantly, the prohibition of the abuse by a State of the rights enjoyed by it by virtue of international law. The fact that this concept is deeply embedded in contemporary international law is evident in the jurisprudence of international law.

By recognizing the need for a clearer articulation of these doctrinal foundations of International law in the present context, the paper will in its Part I, analyze the nature and scope of international law relating to trans-boundary harm. Therefore, Part I not only reflects the contemporary International law on the principle of territorial sovereignty and the doctrine of abuse of rights, but also analyze the evolution of the main principles of international environmental law and the realization of trans-boundary environmental cooperation into emerging procedural obligations of prior information, consultation and exchange of information by paying due attention to the relevant legal instruments and recent jurisprudence.

In fact, the development of procedural obligations in international law beginning from 1982 United Nations Convention of the Law of the Sea (UNCLOS) has greatly enhanced international protection of the marine environment. It has, *inter alia*, enabled States that may be affected in the future by environmentally degrading activities of other States to take part in the decision-making process at the vital stage where such potentially harmful activities are embarked upon. This new law of international responsibility attempts to strike a careful balance between international environmental protection and the principle of territorial sovereignty.

Hence, emerging principles relating to international environment law beyond the general duty to cooperate are of greater significance to the present case. Therefore Part II of the present paper identifies the relevant evolving international environmental law obligations including the application of the precautionary principle and the principle of cooperation in scientific research, systematic observation and assistance. These evolving legal principles form a basis for a joint



process of assessing environmental risks in the light of increasingly important law relating to State responsibility and liability. Understandably, the main principles in this connection flow from treaty law, international case law and so-called 'soft law'. However, it should be noted that these principles enjoy varying degrees of importance and global acceptance, even though some principles have now, arguably, precipitated into rules of customary international law.

## **Part I – The duty to cooperate in International law: Sovereignty vs. trans-boundary environmental harm**

### **(A) The principle of territorial sovereignty and the doctrine of abuse of rights**

The starting point of this paper lies in the principle of territorial sovereignty, which must bend before international obligations and identification of its limitations, where its exercise touches upon the territorial sovereignty and integrity of another State.

Although in earlier times States assumed 'full' and 'absolute' sovereignty and thus could freely use resources within their territories regardless of the impact this might have on neighbouring States, few would argue today that territorial sovereignty is an unlimited concept enabling a State to do whatever it likes. State sovereignty cannot be exercised in isolation because activities of one State often bear upon those of others and, consequently, upon their sovereign rights. As Oppenheim noted in 1912:

A State, in spite of its territorial supremacy, is not allowed to alter the natural conditions of its own territory to the disadvantage of the natural conditions of the territory of a neighbouring State.<sup>4</sup>

Thus, the principle of territorial sovereignty finds its limitations where its exercise touches upon the territorial sovereignty and integrity of another State. Consequently, the scope for discretionary action arising from the principle of sovereignty is determined by such principles and adages as 'good neighbourliness' and *sic utere tuo ut alienum non laedas* (you should use your property in such a way as not to cause injury to your neighbour's) as well as by the principle of State responsibility for actions causing transboundary damage.

Today, under general international law, a well-recognized restraint on the freedom of action which a State in general enjoys by virtue of its independence and

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territorial supremacy is to be found in the prohibition of the abuse by a State of the rights enjoyed by it by virtue of international law.

The strongest support for these principles and their implications can be found in the jurisprudence of international case law.

In *The Island of Palmas Case* (United States v. The Netherlands, award in 1928) the sole arbitrator Huber, who was then President of the Permanent Court of International Justice, stated that:

Territorial sovereignty involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States.<sup>5</sup>

In the *Trail Smelter Case* (United States v. Canada, awards in 1938 and 1941) the Arbitral Tribunal decided that, first of all, Canada was required to take protective measures in order to reduce the air pollution in the Columbia River Valley caused by sulphur dioxide emitted by zinc and lead smelter plants in Canada, only seven miles from the Canadian-US border. Secondly, it held Canada liable for the damage caused to crops, trees, etc. in the US state of Washington and fixed the amount of compensation to be paid. Finally, the Tribunal concluded, more generally, in what no doubt constitutes its best-known paragraph:

Under the principles of international law, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>6</sup>

The Arbitral Tribunal reached this conclusion on air pollution, but it is also applicable to water pollution and is now widely considered to be part of general international law. This prohibition of causing significant

other States, has also been referred to and elaborated upon in other cases. For example, in 1949, in the *Corfu Channel Case* (United Kingdom v. Albania) the International Court of Justice (ICJ) rendered a judgment, in fact in its very first case, on the responsibility of Albania for mines which exploded within Albanian waters and which resulted in the loss of human life and damage to British naval vessels. On the question whether the United Kingdom had violated Albania's sovereignty, the Court came to the conclusion that the laying of the minefield in the waters in question could not have been accomplished without the knowledge of Albania. The ICJ held that the Corfu Channel is a strait used for international navigation and that previous authorization of a coastal State is not necessary for innocent passage. In view of the passage of foreign ships, the ICJ held therefore that it was Albania's obligation to notify,

[...] for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and to warn the approaching British warships of the imminent dangers to which the minefield exposed them.<sup>7</sup>

Since Albania failed to do so on the day of the incident, the Court held Albania responsible for the damage to the warships and the loss of life of the British sailors and accordingly determined the amount of compensation to be paid. For our purposes, it is relevant that the Court referred to every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.

It is also relevant to refer to the *Lac Lanoux Case* (Spain v. France, award in 1957) on the utilization by France of the waters of Lake Lanoux in the Pyrenees for generating electricity. For this purpose, part of the water had to be diverted from its natural course through the transboundary Carol River to another river, the Ariège. According to Spain, this would affect the interests of Spanish users, but France claimed that it had ensured restoration of the original water flow and had given

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<sup>7</sup> ICJ Reports 1949, p. 22.

guarantees so that the needs of Spanish users would be met. France and Spain were unable to resolve this issue by negotiation, and therefore submitted it to arbitration in 1956. This led to an interesting award dealing with the rights and duties under general international law of riparian States in relation to an international watercourse. The Tribunal concluded that the works envisaged by France did not constitute infringements of the Spanish rights under the Treaty of Bayonne and its Additional Act, because France had taken adequate measures to prevent damage to Spain and Spanish users, and for other reasons. As to the question whether the prior consent of Spain would be necessary, the Tribunal was of the opinion that such an essential restriction on sovereignty could only follow from exceptional circumstances, such as regimes of joint ownership, co-imperium or condominium but not from the case in question:

[...] to admit that jurisdiction in a certain field can no longer be exercised except on the condition of, or by way of, an agreement between two States, is to place an essential restriction on the sovereignty of a State, and such restriction could only be admitted if there were clear and convincing evidence.' According to the Tribunal, prior agreement would amount to 'admitting a 'right of assent', a right of veto', which at the discretion of one State paralyses the exercise of the territorial jurisdiction of another.

However, France was under an obligation to provide information to and consult with Spain and to take Spanish interests into account in planning and carrying out the projected works. According to the Tribunal, France had sufficiently done so. While the Tribunal clearly emphasized the hard-core nature of the principle of territorial sovereignty, it also admitted that it must function within the realm of international law:

Territorial sovereignty plays the part of a presumption. It must bend before all international obligations, whatever their source, but only for such obligations.<sup>8</sup>

From this award is derived in general international law, as Lammers puts it:<sup>9</sup>

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<sup>8</sup> International Law Reports (1957) p.120.

<sup>9</sup> Lammers on International Law (1984) p.517.

A duty for the riparian States of an international watercourse to conduct in good faith consultations and negotiations designed to arrive through agreements at settlements of conflicts of interests.

This duty has been referred to in subsequent cases, such as the *North Sea Continental Shelf Case*, where the Court refers to the obligation to enter into ‘meaningful negotiations’<sup>10</sup> and as well as in the *Barcelona Traction* case (Belgium v. Spain) in which the Court noted that:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*<sup>11</sup>

This concept of the *obligatio erga omnes* could (in the future) be of relevance when global environmental problems are at issue, such as the extinction of the world’s biodiversity, the pollution of international waters, and the threat of climatic change. The world’s climate and biodiversity were identified as a ‘common concern’ of mankind in the 1992 Conventions on Climate Change and Biodiversity.

The Rio Declaration (1992), adopted in a non-binding form by the United Nations Conference on Environment and Development (UNCED), provides in Principle 2 that States shall prevent transboundary damage:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national

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<sup>10</sup> ICJ Reports 1969, p.3.

<sup>11</sup> ICJ Reports 1970, p. 32, para. 33. In the next paragraph, the Court stated that such obligations might derive, for example, in contemporary international law ‘from the outlawing of acts of aggression, and of genocide, as also from principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination’. In such cases a State has obligations vis-à-vis the international community as a whole and every other State can hold it responsible and institute a so-called *actio popularis* in protection of the community’s interest.

jurisdiction and the health of human beings, including generations unborn.<sup>12</sup>

In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the ICJ recognizes:

The existence of the general obligations of States to ensure that activities within their

## **(B) The evolution of the main principles of international environmental law**

The present section will examine the SSCP project in the light of existing principles of international environmental law that are based on customary international law, multilateral treaties and decisions of the ICJ and ITLOS.

International environmental law evolves with an integrated legal approach to environmental management and solves environment related conflicts at regional and global levels. The negotiation of resolutions, recommendations or declarations in important global forums often carries normative weight and facilitates their entry into customary law. The 'soft approach' of a nonbinding framework or 'umbrella legislations' becomes a step on the way to 'hard law' in the form of conventions, agreements, treaties or protocols. Gradually, it incorporates elements of responsibility, liability and compensation followed by penalties, sanctions, implementation and dispute settlement. However, the changing institutional structure of international cooperation and governance has created new trends where conferences of parties (COPs) and systems of implementation reviews (SIRs) have become vital elements. Regional laws, bilateral agreements and national instruments play a complimentary role.

The UN Declarations on environment commencing with the Stockholm Declaration of 1972 and over a 150 international instruments which followed, provided ample evidence of State obligations in regard to Environment Law. Justice Weeramantry in his dissenting Opinion on the Use of Nuclear Weapons, (ICJ-Advisory Opinion of 8 July 1996) at the request of World Health Organization (WHO), outlined how these obligations had accrued. He observed:

From rather hesitant and tentative beginnings, environment law has progressed rapidly under the combined stimulus of over more powerful means of inflicting irrevocable environmental damage and an ever-increasing awareness of the fragility of global environment. Together these have brought about a Universal concern with





under an international treaty that is commonly referred to as the “incorporation” of a treaty into domestic law.

However there are situations where international treaties may be taken into account by the Courts as a declaratory statement of customary international law, which itself is a part of the law of the land; and as relevant to the interpretation of a statute.

The first situation, where a treaty is declaratory of customary international law, underlines the point that customary international law itself forms part of domestic law.

No treaty binds States without its consent. Indeed it is an exercise of sovereignty that States undertake in deliberately assuming those commitments. Therefore obligations assumed under the UNCLOS are more than balanced by corresponding commitments by other States to act towards the particular State in a manner that protects or is consistent with its interests. As a small, developing trading nation Sri Lanka has an obvious interest in rules that protect the freedom of protection of the marine environment and the navigation of vessels carrying exports to foreign markets. Furthermore, with modest enforcement capabilities, the protection afforded by UNCLOS is no little comfort to the managing of human impacts on Sri Lanka’s marine environment.

Then the question of soft law obligations in addition to treaty law has become the subject of attention. To some extent, experts recognize a limited normative force of certain norms in soft law even though they concede that those norms would not be enforceable by an international court or other international organ. To say that it does not exist because it is not of the ‘enforceable’ variety that most legal norms exhibit takes to another dimension of the reality of international practice.

In practice, the development of soft law norms with regard to the protection of the human environment began immediately after the Stockholm Conference with the creation of a special subsidiary organ of the UN General Assembly devoted to the promotion of both universal and regional environmental law. This United Nations

Environment Program (UNEP) has played a leading role in the promotion of international cooperation in matters related to environment. A prime example of this phenomenon is provided even in its early stages by the 1978 UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States.

At the regional level in general, and in Europe in particular, several international institutions have engaged in important activities related to environmental protection: the Organization for Economic Cooperation and Development (OECD), which, in particular, has adopted a series of recommendations conceived of as a follow-up to the Stockholm Declaration regarding the prevention and abatement of transfrontier pollution; the European Economic Commission (EEC) which has adopted Programmes of Action for the Environment, on the basis of which hard law is later established mainly by way of directives.

The action of some non-governmental organizations has also contributed to this aspect of international law. The International Law Association (ILA), for example, adopted an influential resolution in 1966 known as the Helsinki Rules on the Use of Waters of International Rivers, which was expanded and enlarged by the same institution in 1982 with the adoption of the Montreal Rules of International Law Applicable to Transfrontier Pollution.

All of the international bodies referred to above should be viewed, as far as their recommendatory action in this field is concerned, as transmitting basically the same message. Cross references from one institution to another, the recalling of guidelines adopted by other apparently concurrent international authorities, recurrent invocation of the same rules formulated in one way or another at the universal, regional and more restricted levels, all tend progressively to develop and establish a common international understanding. As a result of this process,

conduct and behavior which would have been considered challenges to State sovereignty twenty-five years ago are now accepted within the mainstream.<sup>16</sup>

Hence, generally understood that soft law creates and delineates goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations. It is true that in the majority of cases the

responsibility and obligations that arise out of lawful state conduct were referred to as dealing with different shades of prohibition.<sup>18</sup>

Despite all the criticisms, soft law does perform positive functions in a world that is deeply divided. Thanks to soft law, States still have people channeling efforts toward law and toward trying to achieve objectives through the legal mechanism, rather than going ahead and doing it in other fashions. This, in itself, represents some reinforcement of the legal symbol and, at least, prevents or retards the use of violence to achieve aims.

The rapid growth of soft law and complaints about it are, in large part,

(the Charter of Economic Rights and Duties of States); OECD Council recommendations on Transfrontier Pollution and the Implementation of a Regime of Equal Right of Access and Non-Discrimination in Relation to Transfrontier Pollution and ILA resolutions of 1966 and 1982 are all some of early examples in this regard.

interest in the international rivers as well as the necessity of co-operation of the States in the area of prevention of environmental harm arising out of activities regarding these common rivers.

The UN General Assembly Resolution No. 3129 on 'Co-operation in the field of the environment concerning natural resources shared by two or more States' adopted 13 December 1973, has called for "States to establish 'adequate international standards for the conservation and harmonious exploration of natural resources common to two or more States.'" It also provides that co-operation between countries "must be established on the basis of a system of information and prior consultation." Article 3 of the Charter of Economic Rights and Duties of States, 1974 states to the similar effect:

In the exploitation of natural resources shared by two or more countries, each state must co-operate on the basis of a system of information and prior consultation in order to achieve optimum use of such resources without causing damage to the legitimate interests of others.<sup>20</sup>

The most important aspect of transboundary co-operation is that a State involved in any proposed project for the use of shared resources must inform the other State, which is likely to be affected by such a project. In this way each State will have the opportunity to determine whether the project in question is going to cause any damage or if it entails a violation of the principle of equitable and reasonable use of the resource.

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<sup>20</sup> Article.3, Charter of Economic Rights and Duties of States,1974.

### **(C) Influence of jurisprudence in realization of trans-boundary environmental cooperation**

The duty of States to consult and cooperate in relation to the potential impact on the environment has been highlighted by the International Tribunal for Law of the Sea (ITLOS) in the MOX Plant case and the Malaysia/Singapore case merit some examination here.

In the MOX plant case Ireland objected to the UK's plans to commission a plant to manufacture mixed oxide (MOx) fuel as an addition to the Sellafield nuclear complex, for fear that related activities would harm the Irish Sea. In seeking provisional measures under Article 290 of UNCLOS Ireland claimed, *inter alia* that the UK has breached its obligations under Articles 123 and 197 of UNCLOS in relation to authorization of the Mox plant, and has failed to cooperate with Ireland in the protection of marine environment of the Irish Sea by refusing to share information with Ireland and / or refusing to carry out proper environment assessments on the impact of the Plant.<sup>21</sup>

Under Article 123, States bordering an enclosed or semi-enclosed sea should cooperate in assuming their rights and performing their duties under the Convention. This cooperation includes endeavouring to coordinate in the implementation of their rights and duties with respect to the protection and preservation of the marine environment. Article 197 requires the parties to cooperate on a global and as appropriate regional basis, directly or through international organizations in formulating *inter alia* standards, and recommended practices and procedures for the protection and preservation of marine environment. Ireland also relied on Article 206, which contains an obligation for States to assess the potential effects of planned activities under their jurisdiction or control that may cause substantial pollution of, or significant and harmful changes to the marine environment.

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<sup>21</sup> Mox Plant case (ITLOS -UK v. Ireland), Request for Provisional Measures, ITLOS reports 2001, p.95.



The ITLOS considered, in paragraph 82:

[...] that the duty to cooperate is a fundamental principle in the

ensures that community interests are taken into account *vis-à-vis* individualistic State interests. It was a matter of prudence and caution, as well as in keeping with the overriding nature of the obligation to co-operate, that the parties should engage therein as prescribed in paragraph 89 of the Order.<sup>25</sup>

The *Land Reclamation case (Malaysia v. Singapore)*, concerned a request for provisional measures under Article 290(5) of UNCLOS submitted by Malaysia in its dispute with Singapore concerning land reclamation activities carried out by Singapore, which allegedly infringed Malaysia's rights in and around the Straits of Johor. The request was filed with the Registry on 5 September 2003 and the Tribunal delivered its Order on 8 October 2003.

Since January 2002, Malaysia had protested Singapore's unilateral reclamation activities along the straits that they share and had resorted to filing a case with the tribunal after negotiations between the two States failed. Underlying Malaysia's concerns are the harm done to the marine environment along the Straits of Johor, navigational difficulties brought about by a narrower channel at Pulau Tekong and infringement of her territorial waters in an area called Point 20 by reclamation work at Tuas. The Singapore's reclamation works, involving 5,214 ha of sea area and expected to be completed in 2010, will lengthen the headland in Tuas by 7 km and double the size of Pulau Tekong. Because of the reclamation work in Pulau Tekong, the distance between the island and Malaysia's Pularek naval training base at Tanjong Pengelih has been reduced to 0.75 km from 1.8 km.

Malaysia alleged that by Di

Malaysia maintained that Singapore had categorically rejected its claims and had stated that a meeting of senior officials as requested by Malaysia would only be useful if the Government of Malaysia could provide new

(a) that there was no evidenc

co-operate and consult in establishing a group of independent experts with terms of reference agreed upon by both sides. The group would have to conduct a study to determine the effects of Singapore's land reclamation and to propose measures to deal with the adverse effects.

Most importantly in a Joint Declaration, *ad-hoc* Judges Hossain and Oxman referred to the fundamental principle on which the Law of the Sea Convention is built and stated as follows:

The right of a State to use marine areas and natural resources subject to its sovereignty or jurisdiction is broad but not unlimited. It is qualified by the duty to have due regard to the rights of other States and to the protection and preservation of the marine environment. Nowhere is the importance of this principle more evident than in and around a narrow strait bordered by each party throughout its length. What is most urgently required to protect the respective rights of the parties pending a decision by the Annex VII arbitral tribunal is the establishment of a joint process for addressing their most immediate concerns, in this regard that builds on their respective statements and implements their duty to cooperate. Two elements are particularly important. The first is the establishment of a common base of information and evaluation regarding the effects of the land reclamation project that can command the confidence of both parties. The second is the fact that the parties are expected to consult with a view to reaching a prompt agreement on such temporary measures.<sup>30</sup>

In fact, recognizing that general international law principle of duty to cooperate manifests itself as an over riding obligation whereby States must inform and consult one another, prior to engaging in any activity or initiative that is likely to cause trans-boundary environmental harm paves the Part II of the paper to

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<sup>30</sup> Joint Declaration, *ad-hoc* Judges Hossain and Oxman. *TLOS -Malaysia v. Singapore*, Request for Provisional Measures, 5 September 2003, at para. 16. ITLOS reports, Volume 7, 2003,p.34. (The Arbitration case, initiated by Malaysia pursuant to Annex VII of the UNCLOS before a five-member arbitral tribunal under the auspicious of International Permanent Court of Arbitration met on 10 January 2005 at the Peace Palace and determined that no further action would be taken by the Tribunal after it was briefed by the counsels of both parties on the progress in their negotiations aimed at resolving the issues by entering into a Settlement Agreement.)

consider related international environmental law obligations beyond the general duty to cooperate, in detail.

However the present paper will narrow this broad topic by tackling it within a policy frame that the State of origin of the potentially dangerous activity should take into consideration the interests of any potentially exposed State in order both to explain the significance of substantial Environm



The notion of precaution is an attractive one. It can be taken to mean that it adopts a parental attitude towards the environment, protecting it from potential harm by acting on foresight and avoiding unacceptable risks. It appears that the precautionary principle (PP) has had a meteoric rise in the international law arena, moving rapidly through soft law to being incorporated into treaties and, at the same time, hardening from an academic principle to a more clearly defined objective principle.<sup>32</sup>

The precautionary principle is included in the Rio Declaration, Principle 15 which states:

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.<sup>33</sup>

The following extract from Bernie and Boyle goes some way towards explaining the confusion that can arise over the level of harm that it is envisaged will trigger the operation of the principle:

Some states have asserted that they are not bound to act until there is clear and convincing scientific proof of actual or threatened harm.[...]this argument has been used at various times to delay the negotiation of measures to tackle the risk of global



prevention at an earlier stage, when there is still some room for uncertainty. Expressions such as 'reasonably foreseeable' or 'significant risk' allow both the magnitude of harm and the probability of its occurrence to be taken into account. A stronger version of the precautionary principle goes further by reversing the burden of proof altogether. In this form, it becomes impermissible to carry out an activity unless it can be shown that it will not cause unacceptable harm to the environment. Examples of its use in this sense include the resolution-suspending disposal of low-level radioactive waste at sea without the approval of the London Dumping Convention Consultative Parties. [...] The main effect of the principle in these situations is to require states to submit proposed activities affecting the global commons to international scrutiny.<sup>34</sup>

Judge Weeramanthy explained the precautionary principle in the French Nuclear Test cases, as a principle, which places a clear burden on a State to carry out a precautionary lawful activity to establish that no essential damage will ensue as a result of such activity. However, he was reluctant to recognize the precautionary principle as an established principle in international law and stated that it can without doubt be termed as an emerging principle.

Several international instruments and case law decisions have been outlining a profile with different connotations for the Precautionary Principle. The 1982, the



As already indicated, the Precautionary Principle is supported by general principles of law such as good faith, avoiding abuse of the law, duty of diligence, liability for damages, etc.

In terms of acknowledging the PP as a common rule of law, the statements by Justices Shearer, Laing and Treves in the ITLOS Bluefin Tuna Cases, are explanatory, as outlined below. In this case, the burden of the proof is reversed, as the person intending to implement the action must prove that it is not harmful at the product or process levels.

It should be noted that several States have included the PP in their domestic laws, including Germany, Australia, Canada, New Zealand, South Africa and Israel, particularly in terms of fisheries.

However UNCLOS does not include a specific reference to this principle, although covering perfectly, among other matters, to accept the duty of determining the allowable catch of living resources in their exclusive economic zone, in order to avoid endangering them through excessive exploitation,<sup>39</sup> the commitment to cooperation in terms of confirming highly migratory species<sup>40</sup>, marine mammals<sup>41</sup>, anadromous species,<sup>42</sup> catadromous species,<sup>43</sup> the duty to adopt measures designed to conserve the living resources of the high seas in terms of their nationals,<sup>44</sup> the duty of deciding on the allowable catch and establishing other conservation measures for the living resources of the high seas,<sup>45</sup> the duty to adopt the steps required for the effective protection of the marine environment in the Zone.<sup>46</sup> the general obligation to protect and preserve the marine environment,<sup>47</sup> the obligation to take all steps compatible with the Convention as required to prevent, reduce and control marine pollution from any source

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<sup>39</sup> Article 61 of UNCLOS

<sup>40</sup> Article 64 of UNCLOS

<sup>41</sup> Article 65 of UNCLOS

<sup>42</sup> Article 66 of UNCLOS

<sup>43</sup> Article 67 of UNCLOS

<sup>44</sup> Article 117 of UNCLOS

<sup>45</sup> Article 119 of UNCLOS

<sup>46</sup> Article 145 of UNCLOS

<sup>47</sup> Article 192 of UNCLOS

whatsoever,<sup>48</sup> the duty to avoid transferring damages or dangers, nor turning one type of pollution into another,<sup>49</sup> the duty of adopting measures to prevent marine pollution caused by the use of technologies or the introduction of new or exogenous species,<sup>50</sup> the obligation to issue laws and regulations to prevent, reduce and control marine pollution from: onshore sources,<sup>51</sup> activities on sea bottom, subject to national jurisdiction,<sup>52</sup> activities performed in the Zone by vessels or facilities operating under their flag,<sup>53</sup> dumping,<sup>54</sup>

Furthermore, Article 237 of the UNCLOS established that the provisions stated in Part XII (Protection and Preservation of the Marine Environment) do not affect the specific obligations accepted by the States under special agreements and conventions signed earlier on this matter, nor agreements that may be signed to promote the general principles of the Convention.<sup>63</sup>

In terms of the precautionary principle, international jurisprudence is focused on a few cases, such as: *French Nuclear Tests* (ICJ, 1995), *Gab ikovo-Nagymaros* (ICJ, 1997), *Beef Hormones* (WTO Appellate Body, 1997), *Agricultural Products* (WTO Appellate Body, 1998), *Southern Bluefin Tuna* (ITLOS, 1999), *MOx Plant Case and Land Reclamation Case* (ITLOS, 2003) in addition to some other cases held by the European Court of Justice.

In the *Nuclear Tests* case, New Zealand invoked the obligation of France to furnish evidence that underground nuclear tests do not result in the introduction of such materials into the environment, in compliance with the PP.<sup>64</sup> In a Dissenting Opinion, Justice Palmer indicated that both the PP as well as the requirement for evaluating the environmental impact should be pursued “where activities may have a significant effect on the environment”<sup>65</sup>. In turn, Justice Weeramantry, who also issued a dissenting opinion, thought that the PP was developing into a part of the international environmental law. In both cases, the Justices had assigned a common value to the principle.

In the *Gabcikovo-Nagymaros* case, ICJ stated, in the paragraph 113 of its Judgment: “Court recognizes that both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures.” Further, in paragraph 140, the court also stated;

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<sup>63</sup> V. Hansson, Ruden, Sandin, The Role of Precaution in Marine Risk Assessment. Background Paper for the News Policy Forum, Javea, Spain, 26 September 2002.

<sup>64</sup> Request for an Examination of the Situation in Accordance with paragraph 63 of the ICJ's Judgment of December 1974 in *Nuclear Tests*, ICJ Reports 1995, Order issued on September 22, 1995.

<sup>65</sup> *Ibid.*p.90.

It is clear that the Project's impact upon, and its implications for, the

I fully understand the reluctance of the Tribunal in taking a position as to whether the precautionary approach is a binding principle of customary international law. Other courts and tribunals, recently confronted with this question, have avoided givi

indicate that this is a free decision through which a State or international entity exercises its sovereign powers to determine the level of environmental protection



consensus, there is no denying that it has generated an obligation for the policy-makers: remaining permanently alert to the dangers of ignoring the potential risks of specific activities.

## **(E) Significance of joint process of assessing environmental risks**

As already implied, the customary duty not to cause damage to the environment of other States is the central point of reference in our context. It has to be underlined that ICJ has acknowledged the legally binding character of that rule. In the *Gabcikovo Nagymaros Case*, the ICJ stated that:

[...] the existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.<sup>74</sup>

Thus, the ICJ reaffirmed that this basic environmental obligation is part of general international law, not simply a principle guiding a sectoral and rather isolated marginal new legal field. It is also interesting to note that the ICJ did not find it necessary to mention that particular part of Principle 21 of the Stockholm Declaration, which refers to the use of resources. By doing this, the ICJ placed the emphasis on the environmental component of that Principle. The ICJ implicitly acknowledged that the scientific knowledge, the technological innovations and the widely established rules and procedures of environmental policy and law enable at present times States to use their natural resources in a sustainable way, without damaging the environment of other States.

As already outlined, the customary duty not to cause damage contains a preventive component. That means, it also covers activities which may have an adverse transboundary impact. Accordingly, States have to take preventive measures in order to avoid such impacts. The Environmental Impact Assessment (EIA) reflects this preventive approach and the principle of prevention, which is an integral component of the basic customary rule for the protection of the environment of other States and of the global commons.<sup>75</sup>

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<sup>74</sup> Case Concerning the *Gabcikovo - Nagymaros Project*: (Hung. v. Slovak.), (25 Sept 1997) ICJ Reports 1997 p.7.

<sup>75</sup> Espoo Convention, (EIA Convention) Feb. 25, 1991.

At this stage it is necessary to understand the components of an environmental impact assessment. The environmental impact assessment is a systematic and detailed study of the adverse effects that a planned activity may have on the environment. The EIA is meant to ensure consideration of a project's environmental impacts and to influence policymaking by predicting the implications of a project and aiding in the mitigation and alleviation of any harm. There are no clear and defined standards for environmental impact assessments, and different planners and analysts conduct them differently. Due to variation in political regimes, natural systems, and cultural values, it is difficult to generalize one all-purpose procedure for impact assessment.<sup>76</sup>

Nonetheless, to give an overview of the EIA process, some generalizations can be made. An EIA usually begins with preliminary activities, which include choosing a decision maker, describing the proposed action, and reviewing applicable legislation. The next step is impact identification, or scoping, which requires a selection of the various impacts to be studied, a decision that is generally made with respect to magnitude, extent, significance, and special sensitivity of certain areas to certain harms.

Most EIAs cover four broad categories of impacts, ecological, social, technological, and risk or hazard impacts.<sup>77</sup> Next, for purposes of comparison, a baseline study of the area prior to the proposed action must be conducted. Impact evaluation and quantification then occurs. During this stage, various mitigation measures are considered, because alleviating certain harms may make one alternative more appealing than another. Quantification is very difficult because many of the proposed impacts do not have a readily available economic value. In the next stage, the different alternatives and their predicted impacts are compared. Many EIAs are then reviewed by a Government, department, agency, or board, and public participation and comment is generally conducted. Lastly, the EIA process includes documentation, which creates a detailed environmental impact statement

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<sup>76</sup> Yusuf j. Ahmad & George k. Sammy, Guidelines to Environmental Impact Assessment in Developing Countries p.9 (1999).

<sup>77</sup> Michael Clark & John Herington, Introduction: Environmental Issues, Planning and the Political Process, p 1,4.

delineating the comparison of alternatives and decision making, during which policymakers choose a project alternative based upon the environmental impact assessment. Lastly, the decision maker may have difficulty separating facts and subjective values, while personal preferences may also compromise the impartiality of an EIA procedure.

One scholar has identified eight principles for the design of an effective impact assessment process.<sup>78</sup>The principles are:

- (1) An integrated approach;
- (2) Clear and automatic application of all requirements to all significant undertakings;
- (3) Critical examination of purposes and comparison of alternatives;
- (4) Legal, mandatory, and enforceable requirements;
- (5) Open and participatory process;
- (6) Consideration of implementation issues, including monitoring and compliance enforcement;
- (7) Practical and efficient execution; and
- (8) Links to broad policy concerns, such as the economy, agriculture, transportation, and urban development.

Following these guidelines, EIAs can be performed effectively and have the potential to influence environmental policy worldwide.

The roots of environmental impact assessments can be found in the 1972 Stockholm Declaration. It acknowledged the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment. The Stockholm Declaration recognizes the need for environmental “planning” in seven of its twenty-six principles. Twenty years later, at the second international conference on the environment, the Rio Declaration on Environment and Development recognized that the concept of “planning” had become a concrete obligation to undertake environmental impact assessment. In Principle 17, the Rio Declaration states:

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<sup>78</sup> Robert V. Bartlett, *Integrated Impact Assessment: The New Zealand Experiment*, in *Environmental policy: transnational issues and national trends*(1997) p.157, 166.

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse effect on the environment and are subject to a decision of a competent national authority.<sup>79</sup>

On 25 September 1997, the ICJ decided the *Case Concerning the Gabčíkovo-Nagymaros Project* (Hungary vs. Slovakia), resolving a long-standing dispute between the States of Hungary and Slovakia. The case dealt with a 1977 treaty between the two countries that created a joint project to construct a series of dams and barrages on the Danube River, which runs along the countries' border. The Treaty required the construction of two series of locks, one at Gabčíkovo (in

It appears that while the parties spent a great deal of time arguing over whether the many studies fulfilled the requirement for an environmental impact assessment, the opinion of the ICJ makes no mention of these studies or their adequacy as EIAs. The ICJ dealt with the studies in a cursory fashion, stating: both Parties have placed on record an impressive amount of scientific material aimed at reinforcing their respective arguments.<sup>80</sup>

The ICJ has given attention to this material, in which the Parties have developed their opposing views as to the ecological consequences of the Project. It concludes, however, that it is not necessary in order to respond to the questions put to it in the Special Agreement for it to determine which of those points of view is scientifically better founded. While avoiding a direct discussion of the scientific studies, the ICJ instead based its decision that Hungary was not entitled to abandon the works at Nagymaros on the doctrine of treaty law. Under treaty law, suspension of a treaty is justified if it is the only means of safeguarding an essential interest that in situations of grave and imminent peril.<sup>81</sup> Applying this standard, the ICJ found that Hungary's purported 'environmental necessity' did not entitle it to suspend work on the project because the potential environmental harms were not grave and imminent, but were uncertain and long-term.<sup>82</sup>

While refusing to address the scientific studies directly, the ICJ apparently agreed with Slovakia's version of the facts;

If state of necessity could not exist

acknowledges, the damage that it apprehended had primarily to be the result of some relatively slow natural processes, the effects of which could not easily be assessed.<sup>83</sup>

It seems the judges believed that the scientific studies had been inadequate and that more assessment was needed, they could have characterized this lack of information as “grave and imminent peril.” Indeed, it can be implied that the Court found Slovakia’s scientific arguments more persuasive in stating that “Hungary could [...] have resorted to other means in order to respond to the dangers that it apprehended.”<sup>84</sup>

In contrast to the Court’s opinion, Justice.C.G.Weeramantry’s concurring opinion directly addressed the issues of international environmental law, and delineated guidelines for the parties to follow in future negotiations. In particular, Weeramantry J. discussed environmental impact assessment in detail and stressed that any future version of the Project must be preceded by a complete EIA.

While the Court’s opinion avoided the scientific argument

discussion of international environmental obligations, especially environmental impact assessment was much richer than that attempted by the Court.

Weeramantry J's opinion began with a discussion on sustainable development as a principle of international law. He described the concept of sustainable development through historical examples of sustainability in ancient civilizations.<sup>86</sup> In concluding his discussion on sustainable development, he asserted that modern environmental law should "take account of the perspectives and principles of traditional systems, not merely in a general way, but with respect to specific principles, concepts.

He then cited the principle of trusteeship of the earth's resources, the principle of intergenerational rights, the principle that development and environmental conservation must go hand in hand,' arguing that most of these principles have relevance in the present case.

Weeramantry J. also asserted that environmental protection is a sine qua non for numerous human rights such as the right to health and the right to life itself and concluded by stating that;

While all peoples have the right to initiate development projects and enjoy their benefits; there is likewise a duty to ensure that those projects do not significantly damage the environment.<sup>87</sup>

The *Gabcikovo-Nagymaros Case* does bode well as a precedent for future disputes over the environmental effects of development, while the Court's opinion did require the parties to "look a fresh" at the environmental consequences of their future actions.

The Dissenting Opinion given by Weeramantry J, on 22 September 1995 in the Nuclear test case between New Zealand and France is also relevant to the present

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<sup>86</sup> See *Ibid.* at Para.9-10 (discussing environmentalism in the ancient irrigation based civilization on Sri Lanka), 16 (detailing the irrigation systems of China and the Inca civilizations).

<sup>87</sup> *Ibid.* Para. 52.



analysis. Commenting on UN Environmental

**(F) The evolving law of State responsibility and liability**

Apparently, International law has begun to react to this new challenge in several ways. Firstly the public interests of the world community are gradually being recognized since the Barcelona Traction case<sup>91</sup>. The violation of obligations *erga omnes* as in East Timor case would provide legal standing to all States to react. Secondly, the concept of *jus cogens* also provides a legal ground for the action of states not directly damaged. And finally, the rules relating to the Law of Treaties on the breach of a multilateral treaty equally allow for the action of all states concerned. In addition, the work of the ILC on the codification of the Law of State Responsibility follows a similar orientation.<sup>92</sup>

The compound 'primary' obligation identified by the ILC in its commentary on 'international liability' refers to four basic duties: prevent, inform, negotiate, and repair. The emphasis is on preventive measures as well as the new obligation to notify and consult. However, it is surprising that the failure to comply with the first three duties mentioned is not regarded as wrongful and, consequently, no action can be brought against such failure; only the failure to make reparations is ultimately identified with a wrongful act and, hence, engages the State's responsibility.

It seems the ILC's proposed liability scheme is a general scheme, intended to operate alongside and to complement schemes targeted to establishing arrangements for liability in relation to a particular pre-identified source of potential harm, such as, for example, the International Maritime Organization (IMO) Conventions for the compensation of damage caused by oil pollution from ships.

Draft Article 5 stated that: 'In accordance with the present articles, liability arises from significant transboundary harm caused by an activity referred to in article 1 and shall give right to compensation or other relief'<sup>93</sup>. Yet the draft articles did not articulate or identify the basis of such liability, inferring that liability might consist solely of the procedural obligation to negotiate an appropriate level of

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<sup>91</sup> The works of the ILC(2001) p.11(Doc.A/CN/53/10)

<sup>92</sup> Ibid p.18.

<sup>93</sup> Ibid. p.16.

compensation. Draft Article 21, the key provision, provided that: “The State of origin and the affected State shall negotiate at the request of either party on the nature and extent of compensation or other relief for significant transboundary harm caused by an activity referred to in article 1, having regard to the factors set out in article 22 and in accordance with the principle that the victim of harm should not be left to bear the entire loss.” Draft Article 22 set out equitable factors to be taken into account in the negotiations, for example the extent to which the affected State shares in the benefit of the activity that has caused the harm.

The procedural character of the residual ILC liability scheme has qualified it as an example of the growing number of procedural obligations in international environmental law. Apparently, the ILC liability scheme significantly contributes to the legitimaization of decisions by powerful States to undertake activities carrying a risk of harm to human health or the environment borne by less powerful States.

ILC scheme is intended to be applicable where there is no prior breach of any international legal obligation and will be based on the concept of strict liability, as known through the rule in *Rylands v Fletcher*, according to which a defendant may be held liable for harm despite having exercised all due care to prevent an event occurring.

UNCLOS and related treaties have significantly developed the rules of international law applicable to the preservation of the marine environment and illustrate the evolution of State responsibility in this regard. Part XII of UNCLOS, dealing with the Protection and Preservation of the Marine Environment, imposes a general obligation on States to protect and preserve the marine environment.

Under Article 194(2) of UNCLOS, States, shall take all measures ne8.27 0 TD-0.0vironmeT

not spread beyond the areas where they exercise sovereign rights in accordance with this Convention.

The activities included in this obligation are those undertaken both by the State and by entities of a private nature under State jurisdiction and control. It is also quite apparent that this provision covers not only transboundary effects of pollution but also harm to areas beyond national jurisdiction. In other words, the global scale of environmental effects is incorporated into this particular regime. Today, the principle of sovereignty over natural resources gives rise in international environmental law to both rights and duties of States on the one hand, States have the right to pursue freely their own economic and environmental policies, including conservation and utilization of their natural wealth and the free disposal of their natural resources; on the other hand, obligations and responsibilities have emerged which confine the States' freedom of action.

In future, these principles may also gain relevance for the protection and conservation of the intrinsic value of nature, the environment and of what belongs to all of us, such as major ecological systems of our planet and biological diversity.

In any event, it is clear that procedural obligations, to varying degrees, move the locus of international decision-making authority in relation to environmental risks, so that those States that may be affected at some future point in time by a risk, if it eventuates, become entitled, to participate to a certain extent in decision-making at the time when the activity involving the risk is being embarked upon.<sup>94</sup>

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<sup>94</sup> An extract from the proceedings of the ILC Working Group on International Liability for the Injurious Consequences of Acts not Prohibited by International Law (Fifty third Session of the ILC, 2001, Doc, A/CN. 4/2. 53/33 p.83.

## Concluding remarks

it is evident, in the light of the on going diplomatic correspondence and negotiations, that a dispute exists between Sri Lanka and India on Sethusamudram Ship Channel Project (SSCP). In fact, as explained in the preceding sections of the paper Sri Lanka can point to the failure by India to;

- (a) Comply with its good neighbourly obligations under UNCLOS,
- (b) Notify Sri Lanka of project that risk serious transboundary impact,
- (c) Consult with Sri Lanka thereon and
- (d) Initiate joint consideration of the environmental consequences of the SSCP project.

In opposition to this, India denies that the SSCP project impinges on Sri Lanka's territorial waters or that it may adversely affect Sri Lanka's coastal and maritime environment. Apparently, India invokes the principle of sovereignty over its territorial sea and its natural resources as well as its right to development including the right of coastal state to determine freely the management of its territorial sea for its own development.

However, the Government of Sri Lanka has, for a long time been invited the Indian Government's attention to the SSCP's implications for Sri Lanka. Sri Lanka's aim has throughout been to seek to establish a proper system of consultation, notification and exchange of information. In other words, the sum effect of the initiative taken by Sri Lanka is to build a mechanism for exchange of information and joint assessment of risks through a common base of information and to work out modalities to address the concerns in a manner that can command the confidence of all stakeholders of the SSCP Project. As a matter of law, both States have an obligation to protect the marine environment and to avoid conduct which impacts adversely on the territory of the other State. This is based on well recognised principles of international law relating to the duty to have due regard to

the rights of other States and to ensure that activities under the jurisdiction or control of a State are so conducted as not to cause damage by pollution to other States and their environment.

It must also be noted that in situations such as the SSCP Project, the normal course of action between friendly countries would be to consult and cooperate in order to address common concerns and mitigate trans-boundary effects. In fact, both States can also use these types of projects not as a hindrance or threat to each other but as an opportunity for joint activity, which could be economically beneficial to both parties. However such an approach must be undertaken without damaging the environment or jeopardizing the livelihood of ordinary people such as fisher folk on both sides of the maritime boundary.

In summary it is possible to identify three sets of obligations, which the India owes to Sri Lanka, and which give rise to rights, which Sri Lanka can invoke against India:

(a) the obligations of India to cooperate with Sri Lanka to address the concerns in a manner that can command the confidence of all stakeholders of the SSCP Project;

(b) the obligations of India to carry out a joint environmental assessment of the effects on the environment of the construction and with the operation of the Sethusamuduram Ship Channel;

(c) the obligations of India to protect the marine environment of the Palk strait and Gulf of Manna area, including by taking all necessary measures to prevent, reduce and control further pollution of the Sea.

### **(a) The obligations of India to cooperate with Sri Lanka**

By failing to notify or consult with Sri Lanka about its current and planned activities with respect to the SSCP project, India has breached its obligation to co-operate with Sri Lanka under Articles 123 and 197 of UNCLOS. Most importantly, this duty of co-operation is at the centre of the present dispute and It is clear that Sri Lanka has throughout sought a proper system of consultation, cooperation, notification and exchange of information which clearly falls in line with accepted State practice.

It is to be noted that Article 123 specifies an increased duty to co-operate, which is incumbent on States bordering a semi-enclosed sea, both in exercising their rights and in performing their duties under the UNCLOS. It sets out four main areas of activity in which States are to co-operate, including to:

- (a) co-ordinate the management, conservation, exploration and exploitation of the living resources of the sea; and
- (b) co-ordinate the implementation of their rights and duties with respect to the protection and preservation of the marine environment.

Thus Article 123 plainly recognizes that activities undertaken by one State in a semi-enclosed sea may have a direct impact on the rights, duties and interests of other States bordering that same sea. The inclusion of this separate Part IX of UNCLOS alone reflects the recognition that this special geographical situation with shared resources and a fragile marine environment.

Article 122 defines semi-enclosed seas as:

[...] a gulf, basin or sea surrounded by two or more States and connected to another sea or the ocean by a narrow outlet or consisting entirely or primarily of the territorial seas and exclusive economic zones of two or more coastal States.

Apparently, Palk Strait and most of the Palk Bay and Gulf of Manna area fall within the definition of Article 122. They are an area of sea surrounded by two States



consisting entirely of their respective territorial seas and are connected by narrow outlets to the ocean. This prevention of pollution of a semi-enclosed sea becomes more important because of the inability of the waters of a semi-enclosed sea to effectively disperse pollution, which tends to remain contained within those waters, giving rise to greater risk of harm to human health and environmental resources.

Article 197 is entitled 'Cooperation on a global or regional basis' and prescribes a similar duty of co-operation, irrespective of whether particular areas of the sea qualify as semi-enclosed seas. It provides:

States shall cooperate on a global basis and, as appropriate, on a regional basis, directly or through competent international organizations, in formulating and elaborating international rules, standards and recommended practices and procedures consistent with this Convention, for the protection and preservation of the marine environment, taking into account characteristic regional features.

In other words, geographical circumstances of the concerned area heightens India's obligation to cooperate with Sri Lanka 'in the exercise of its rights and in the performance of its duties under UNCLOS, in particular the obligation to coordinate the implementation of its rights and duties with respect to the protection and preservation of the marine environment.

In fact the applicability and the implications of these ar

- (a) exchange further information with regard to possible consequences for the Irish Sea arising out of the commissioning of the MOX plant;
- (b) monitor risks or the effects of the operation of the MOX plant for the Irish Sea;and
- (c)

France's duty of co-operation with Spain meant that it cannot ignore Spain's interests. Spain is entitled to demand that her rights be respected and that her interests be taken into consideration. [...] If in the course of discussions, the downstream State submits schemes to it, the upstream State must examine them, but it has the right to give preference to the solution contained in its own scheme, provided that it takes into consideration in a reasonable manner the interests of the downstream State.<sup>97</sup>

Again, the International Court of Justice, in the 1974 *Fisheries* case, observed that the duty to co-operate required that "due recognition must be given to the rights of both parties."<sup>98</sup> It also means that neither State is entitled to insist "upon its own position without contemplating any modification of it".<sup>99</sup> More recently, ITLOS in the paragraph 82 of its order in the *Mox Plant* case pronounced that:

[...] the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the Convention and general international law and that rights arise there from which the Tribunal may consider appropriate to preserve under Article 290 of the Convention.

Further, it can be observed that this obligation also exists in customary international law, as reflected in Article 3 of the 1974 Charter of Economic Rights and Duties of States:

In the exploitation of natural resources shared by two or more countries each State must cooperate on the basis of a system of information and prior consultations in order to achieve optimum use of such resources without causing damage to the legitimate interest of others.<sup>100</sup>

The Leading International law authors have also recognized that the obligation to cooperate requires regular exchanges of information, the notification of measures or activities which might have effects on other interested States, and where real differences emerge between two States making use of a shared resource, the

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<sup>97</sup>24 ILR 101, at 140 (1957).

<sup>98</sup>*Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, ICJ Reps 1974, p. 31.

<sup>99</sup>*North Sea Continental Shelf Cases*, ICJ Reps 1969, p. 47, para. 85.

<sup>100</sup>GA Res 3281 (XXIX) of 12 December 1974.

obligation to enter into consultations and negotiations.<sup>101</sup> At the very least, the duty to cooperate involves the requirement that the neighbouring State's views and interests are taken into consideration in a reasonable manner.

Furthermore, the International Law Commission has recognized the:

affirmation of a broad principle that States, even when undertaking acts that international law did not prohibit, had a duty to consider the interests of other States that might be affected.<sup>102</sup>

Hence, the obligation of cooperation in accordance with the Article 123 and 197 of UNCLOS and widely accepted rules of international law means that India is obliged *inter alia* (a) to notify Sri Lanka of the activities it has undertaken, (b) to respond in a timely fashion to requests for information from Sri Lanka, and (c) to take into account Sri Lanka's rights and interests in the protection of the marine environment.

In other words, India's obligation to cooperate means that Sri Lanka is entitled to be notified about the essential details concerning the construction and operation of the SSCP project.

**(b) India's failure to provide adequate environmental assessment**

India's obligation to cooperate with Sri Lanka includes the responsibility to take into account Sri Lanka's rights and interest in the protection of its marine environment in the territorial sea. Recognizing that such interest imply, pursuant to Articles 123 and 197 of UNCLOS, taking Sri Lanka's views into account in the decision making process of the SSCP.

As observed, India has systematically chosen not to respond to Sri Lanka's concerns from the beginning; it appears to have ignored them entirely. It now says that Sri Lanka should first come with concrete evidence of the adverse effects of the Project, notwithstanding the fact that India did not initially inform Sri Lanka of what the exact project would be. If that is indeed the case, India plainly cannot claim to have taken into account Sri Lanka's rights and interests. This failure constitutes a further violation of India's duty to cooperate.

It can also be argued that India has violated Article 206 of UNCLOS assessment of potential effects of activities by failing, properly and fully to assess the potential effects of the SSCP project on the marine environment of Sri Lanka. This article provides:

When States have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment, they shall, as far as practicable, assess the potential effects of such activities on the marine environment and shall communicate reports of the results of such assessments in the manner provided in article 205.

The construction of a ship canal in the highly sensitive area and cooperation of it 20(

violation of Article 206 by having failed to carry out an adequate environment assessment of the SSCP on the Sri Lanka side.

Furthermore, India has ignored the legal developments in international environment law and in particular law relating to environment impact assessment in authorizing the SSCP project. In addition, such authorization would violate the obligations of India to apply a precautionary approach and to, *inter alia*, protect and preserve the marine environment, to take all possible steps to prevent and eliminate pollution from land based sources.

At paragraph 140 in the Judgment of the Case Concerning the Gabčíkovo-Nagymaros Project, ICJ emphasized the need to take into account new standards of environmental protection. The International Court stated:

In order to evaluate the environmental risks, current standards must be taken into consideration. [...] The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often-irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage.

Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments in the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past.

The ICJ concluded that for the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant.

In conclusion, Sri Lanka has a right under Article 206 of UNCLOS to expect India to subject the SSCP to an environmental assessment, which takes into account the

environmental standards pertaining at the time of any decision by the Indian authorities.

The definition of “pollution of the marine environment” in t

[...]Singapore is not entitled to say that Malaysia should first demonstrate the adverse effects of Singapore's action, notwithstanding the fact that Singapore did not initially inform Malaysia of what that action would be. Malaysia cannot be expected to respond to a case that has not been presented in appropriate detail. Yet that is what Singapore has asked Malaysia to do; and it is legally unacceptable. So Malaysia has been obliged to introduce into the close and intensive relationship with its neighbour the divisive element of recourse to litigation.<sup>103</sup>

The integrated approach of UNCLOS makes other parts of the instrument applicable to the present case. For example, Article 194 (2) dealing with pollution,



**(c) States have the obligation to protect and preserve the environment.**

In its recent Diplomatic Notes, India has reiterated its view that planned works of the SSCP project will not cause any significant impact on any of Sri Lanka's concerns which, as observed earlier include the protection of the marine environment. It should be noted, particularly, that Indian studies have been almost exclusively focused on the effects of measures in India's territorial waters. Seemingly no serious attempt has been made by India to obtain information, or to measure effects, on the Sri Lankan side. In contrast, Sri Lanka has undertaken such studies and has conducted assessment of the effects of the project and has found that the project threatens to cause serious harm to its marine environment.

As clearly stated by Prof. James Crawford before the ITLOS in the Malaysia–Singapore case:

The concept, as formulated in Part XII, goes much further than merely combating pollution after it has already taken place. It entails the active taking of legal and administrative measures, and the application of scientific methods and procedures which are all designed not simply to check or abate the deterioration of marine ecosystems, but also provide the means for protecting and preserving the marine environment from the harmful effects of pollution and other hazards.<sup>104</sup>

The core components of the comprehensive framework on the rules for the protection and preservation of the marine environment are the provisions on standard setting, on enforcement, and on safeguards. These are closely interrelated.

It is relevant to note Article 194(2) of UNCLOS, because it clarifies that

States shall take all measures nec



exercise sovereignty over the territorial sea in accordance with the Convention and other rules of international law.

This relates directly to Sri Lanka's right of respect for its territorial integrity and its sovereignty. It has the right not to suffer from serious pollution and other significant damage to its marine environment. In fact, India's "right to development" is clearly unsustainable in the given case under the law of the sea obligations.

Apparently Sri Lanka only claims that its rights and interests are duly taken into account, in particular its right to be consulted.

As ITLOS stated in the orders of MOX Plant and Land Reclamation cases, 'the duty to co-operate is a fundamental principle in the prevention of pollution of the marine environment under Part XII of the UNCLOS and general international law.'

Finally, Sri Lanka's case rests on the precautionary principle. A precautionary approach is central to the sustainable use of a territorial sea and it commits a State to avoid human activity, which may cause significant harm to the natural resources and the ecosystem and/or serious infringement of the rights of other States.

The precautionary principle, as Birnie and Boyle state, is an obligation of diligent prevention and control. Hence, precautionary measures should be adopted and based on up-to-date and independent scientific judgment. These measures should be transparent and be made available to all interested parties. The precautionary approach requires that, when 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.

On the other hand, the precautionary approach is reflected in various Articles of UNCLOS, notably Articles 194, 204 and 206, as well as in the definition of pollution in Article 1. In the Southern Bluefin Tuna case, ITLOS relied on scientific uncertainty surrounding the conservation of tuna stocks to justify the award of provisional

measures to protect the stock from further depletion pending the resolution of the dispute. An independent environmental impact assessment is a central tool of international law of the precautionary principle. Such an EIA should have been conducted by India at least to the satisfaction of Sri Lanka.

The precautionary principle is a freestanding customary international law obligation which binds States, and further it is a principle, applicable to the interpretation of

Furthermore Sri Lanka could consider the dumping of the extracted material into the places of close proximity to its maritime boundary as a violation of India's obligations under Part XII of UNCLOS, particularly when read in the light of the precautionary principle. These discharges constitute pollution within the meaning of Article 1(4) of UNCLOS, which pollution will enter the marine environment, including areas over which Sri Lanka exercises sovereign rights or has sovereignty.

These dumpings are also incompatible with India's obligation "to protect and

As pointed out by Sir Lauterpacht in the Land Reclamation case,

It makes no sense, on policy or legal grounds, to proceed with the project and then enter into consultations with a view to developing an appropriate response strategy. In such circumstances these States are merely presented with a *fait accompli*, and their legitimate interests and rights cannot be taken into account. The failure to consult with affected States before the authorization of the Project is incompatible with the very purpos