Chapter 1

The Sardar Sarovar Dam Project: An Overview

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The Sardar Sarovar Project (SSP) is part of a gigantic scheme seeking to build more than 3,000 dams, including 30 big dams, on the river Narmada, a 1,312 km river flowing westwards from Amarkantak in Madhya Pradesh, touching Maharashtra and ending its course in Gujarat. The SSP is a multi-purpose dam and canal system whose primary rationale is to provide irrigation and drinking water. Power generation is another expected benefit. It is the second biggest of the proposed dams on the Narmada, and its canal network is projected to be the largest in the world. The dam is situated in the state of Gujarat, which will derive most of the benefits of the project, but the submergence – 37,533 hectares in total – is primarily affecting the state of MP (55 per cent) and to a much lesser extent the state of Maharashtra.

The SSP has been one of the most debated development projects of the past several decades in India and at the international level. It is only one of many similar big projects in the Narmada valley and in India generally but it has acquired a symbolic status in development debates. This is due in part to the complexity of such multi-purpose projects and the multiple positive and negative impacts associated with big dams. This is also due to the specificities of this project, which was first proposed nearly 60 years ago.

Firstly, the fact that this project involves four states – Gujarat, MP, Maharashtra and Rajasthan – with the state of Gujarat receiving most of the benefits of the project has repeatedly led to disagreements among the concerned states.

Secondly, the nature of Indian water law, which makes control over water largely a prerogative of the States with some oversight of the Central government in inter-state matters, provided the background for the setting of a complex inter-state institutional machinery to oversee the development of the project. This was also the basis for the setting up of a special tribunal, the Narmada Water Disputes Tribunal (NWDT), to adjudicate the claims of the concerned states.

Thirdly, the involvement of the World Bank in the SSP was also a landmark. It not only led to the commissioning of an independent enquiry of an ongoing project but also led the bank to take the unprecedented step of withdrawing from a funded project. This withdrawal had further significant repercussions at the international

level. In particular, it led the World Bank to set up its first internal accountability mechanism, the Inspection Panel. The SSP fiasco also constituted one of the triggers for the setting up of the World Commission on Dams.

Fourthly, the SSP is also a landmark project from the point of view of social movements. While it is now very likely that the dam will be completed as projected by the project promoters, the work undertaken by the Narmada Bachao Andolan (NBA) and other organisations and individuals in the context of the SSP has had important impacts in India and abroad. Thus, to take but one example, before the NBA brought the issue of displacement to the forefront of the policy agenda, oustees had merely been seen as incidental costs of development, so much so that until the early 1990s there were no figures indicating the extent of displacement generated by projects.[1] Overall, regardless of whether oustees are actually resettled or not according to the legal framework put in place and regardless of whether the project eventually fulfils all the environmental and other conditions that have been set over time, the SSP will remain a milestone that has significantly contributed to transforming and redefining people's movements and activism in India and abroad.

This chapter seeks to provide a general framework to understand the documents reproduced in this volume. It addresses some of the main issues relevant in understanding the SSP documents reproduced here. No attempt is made to comprehensively analyse all relevant issues arising from the documents reproduced, something, which would require book-length treatment in itself.

A. Big Dams

The SSP needs to be understood in the broader policy context that has evolved over the nearly 60 years that have elapsed since a dam was first proposed. Throughout the first part of the twentieth century, big dams were seen in the North as one of the solutions to a number of issues. Big dams could, for instance, generate electricity; provide water for irrigation, industrial use and domestic use; store water for use in dry seasons or for transport to water-scarce areas; and contribute to flood prevention. All these perceived benefits led to a construction boom that lasted for several decades. As a result of these efforts, the North has used up 70 per cent of its hydroelectric potential.[2] Dam building in the North declined sharply in the second half of the twentieth century. This was due in part to the realisation that the benefits of large dams were not as important as expected and in part to the growing realisation that big dams had many more negative impacts than had been envisaged

1 Usha Ramanathan, 'Creating Dispensable Citizens', *The Hindu* 14 April 2006, p. 11.

2 Antoinette Hildering, *International Law, Sustainable Development and Water Management* (Delft: Eburon, 2004).

at first. Thus, growing concerns over the environmental impacts of big dams constituted one of the important driving forces behind dams losing their appeal in policy-making circles. However, while dam building may have gone out of fashion in the North during the few decades that coincided with rising environmental consciousness, a new rationale has recently emerged for big dams. Rising global temperatures and the threat of the impact of climate change have led to the search for alternatives to oil-based energy sources. In this context, hydroelectricity is seen as environmentally friendly since it is carbon neutral. While this rationale is noteworthy in the context of the search for climate change mitigation, it does not lessen other existing environmental impacts of big dams.

Dam building on a large scale was also taken up progressively in the South. However, one of the main characteristics of dam building in the South is that it started later than in the North and has largely been taken up without major interruption until this day. Large-scale dam building in big countries like India and China was undertaken in the first place on the basis of the same rationale underlying dam building in the North.[3] One of the main aims that sought to be fulfilled through dams was the promotion of canal irrigation to foster food security. Hydropower was also an important benefit in many cases since electricity generation in the second half of the twentieth century became a central concern, given its pivotal role in fostering economic development. The push for big dam construction was largely nationally driven. However, this has been reinforced by international and bilateral donors promoting big dams as a tool for the economic development of the South. This has not gone without being controversial because the push for big dam building in the South from international actors came more or less at the time when big dams were being sidelined in the North.[4] The emphasis on big dam building in the South went largely unchecked until the World Bank was forced to withdraw from the SSP in 1993. This provided the background for a short decade of reflection on the contribution of big dams to development in the South. This now seems to have been resolved in favour of promoting big dams again. The World Bank thus advocates, for instance, that India still has relatively little capacity to store water and that major investments are required in small and big projects including large dams.[5]

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3 For a comprehensive analysis of a landmark dam and the controversies around it, *see* Shripad Dharmadhikary, Unravelling Bhakra – Assessing the Temple of Resurgent India (Badwani: Manthan, 2005), available at http://www.manthan-india.org/article19.html.

4 *Cf.* Sanjeev Khagram, *Dams and Development – Transnational Struggles for Water and Power* 178 (Ithaca: Cornell University Press, 2004).

5 John Briscoe & R.P.S. Malik, *India's Water Economy: Bracing for a Turbulent Future* (New Delhi: The World Bank and Oxford University Press, 2006).

B. Development of the Project

The first proposals concerning the construction of dams on the Narmada river for irrigation can be traced back to 1945–46 when the idea was mooted by the Central Waterways, Irrigation and Navigation Commission. In 1948, an ad hoc Committee set up by the Government of India recommended that detailed investigation should be undertaken for seven projects, including the Broach Barrage and Canal project (the first name of the SSP).[6]

The Navagam site was first recommended in 1957.[7] The first project proposal envisaged a dam being built in two stages first up to 160 ft and then to 300 ft. This was revised to 320 ft on the assumption that a higher level canal would be necessary for water to reach Kachchh and Saurashtra.[8] It is this version of the project that Prime Minister Jawaharlal Nehru launched on 5 April 1961.

During the years following the laying of the foundation stone, a number of issues were raised in inter-state proceedings. A 1963 agreement on the height of the dam at Navagam between Gujarat and MP was later repudiated. In the same period, MP and Maharashtra came to an agreement on a dam between Navagam and Harinphal, which would have drastically affected the plan for the dam at Navagam.[9]

The Government of India then decided in 1964 to appoint the Khosla Committee to study the entire Narmada basin and prepare a master plan for the optimum and integrated development of the water resources for irrigation, power generation, navigation, flood control and other aims.[10] The master plan proposed the construction of a high dam for a terminal reservoir at Navagam with FRL +500 ft that was found 'to be the optimum level for providing the maximum storage and reducing to the minimum the amount of water wasted to the sea'.[11] The Khosla Committee thus decided that a high dam at Navagam made more economic sense and gave more benefits than a combination of dams in the Navagam-Hiranphal gorge.

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6 Khosla Report, reproduced below at page 41 at 1.

7 Dilip D'Souza, *The Narmada Dammed – An Inquiry into the Politics of Development* (New Delhi: Penguin, 2002).

8 *Id.* at 5.

9 P.M. Bakshi, A Background Paper on Article 262 and Inter-State Disputes Relating to Water, *in* Report of the National Commission to Review the Working of the Constitution, Volume II – Book 3 (New Delhi: Ministry of Law, Justice and Company Affairs, 2002).

10 Khosla Report, reproduced below at page 41 at 2.

11 *Id.* at 4.

The proposals of the Khosla Committee were broadly endorsed by Gujarat but opposed by Maharashtra and MP.[12] Continuing disagreements between the states eventually led Gujarat to request the adjudication of the dispute under the Inter-State Water Disputes Act, 1956.[13] As a result, the Central Government constituted the NWDT in October 1969. This was immediately challenged by MP, which argued that the constitution of the tribunal was *ultra vires* of the 1956 Act.[14]

The NWDT first spent a couple of years addressing preliminary issues. This led to its 1972 decision, which confirmed the Tribunal's jurisdiction over the issue and declared that Rajasthan was not entitled to any portion of the Narmada waters given that it was not a riparian state.[15] MP and Rajasthan appealed to the Supreme Court against the decisions of the NWDT. This largely stalled the proceedings of the NWDT. However, political developments in 1972 led to the Congress party (R) being in power in all four concerned states.[16] As a result of this convergence, a political agreement was reached among the chief ministers of the four states in July 1972 concerning the amount of water available and directing the Prime Minister to find a suitable solution.[17]

This was later confirmed in a 1974 agreement among the four states determining the quantity of water in the river that was to be allocated among the states – 28 Million Acre Feet (MAF) – and the specific allocation to Maharashtra (0.25 MAF) and Rajasthan (0.5 MAF).[18] This decision concerning the determination of the amount of water available in the Narmada river, which constitutes the basis for all subsequent planning decisions, has remained controversial. This is due to the fact that the first figure given was computed in 1965 on the basis of relatively few years of observed flow data (1948–62) complemented with 'derived' data or hind-casting

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12 For MP, *see* Government of MP, Public Works Department, Comments of the State Government on the Report of the Narmada Water Resources Development Committee (Bhopal, January 1966). *See also* Report of the Narmada Water Disputes Tribunal with its Decision in the Matter of Water Disputes Regarding the Inter-State River Narmada and the River Valley Thereof Between the states of Gujarat, MP, Maharashtra and Rajasthan (New Delhi: Government of India, vol. 1, 1979), § 2.4.1.

13 Inter-State Water Disputes Act, 1956, Act 33 of 1956, available at http://www.ielrc.org/content/e5601.pdf.

14 *See* Government of Madhya Pradesh, Demurrer Before the Narmada Water Disputes Tribunal, filed on 24 November 1969 by the State of Madhya Pradesh.

15 Narmada Water Disputes Tribunal, Decision on Preliminary Issues, 23 February 1972.

16 Ranjit Dwivedi, *Conflict and Collective Action – The Sardar Sarovar Project in India* 78 (New Delhi: Routledge, 2006).

17 Agreement of 22 July 1972 Amongst the Chief Ministers of Madhya Pradesh, Gujarat, Maharashtra and Rajasthan, Narmada Development.

18 Agreement of 1974, reproduced below at page 46.

for the period 1915–47.[19] Since then, additional observed flow data puts the figure around 23 MAF.[20] The discrepancy between observed flows and the figure used for planning purposes may pave the way for further conflicts in the Narmada basin once MP makes full use of its water entitlement, should actual water flows be found to be lower than 28 MAF.

The agreement of 1974 led to the resumption of the NWDT proceedings, which went on until 1978. The NWDT gave its decision in August 1978. Following 'references' by all the parties involved,[21] the NWDT's final award was gazetted at the end of 1979. The NWDT took a number of major decisions. On the basis of the 1974 agreement, it allocated 67 per cent of the flow to MP (18.25 MAF) and 33 per cent to Gujarat (9 MAF). The NWDT also fixed the height of the SSP at FRL 138.68 m (455 ft). In other words, the height of the dam was reduced compared to the Khosla proposal but was still higher than MP had suggested. As a result, during the ongoing set of disputes over the dam in the past couple of decades, MP has tried to argue that the dam height should be brought back to 436 ft. The Chief Minister of MP thus tried to persuade the Prime Minister in 1994 that this reduction would save 38,000 persons from being displaced and would save 25,000 acres of land from submergence.[22] The position of MP was taken into account at the highest level. Indeed, the chief ministers of the concerned states and the Prime Minister agreed in 1996 to first plan the dam up to 436 ft and have it operate at that height for five years before moving ahead.[23] This agreement was subsequently abandoned.

The NWDT Award also allocated power benefits among the concerned states. The shares of the three riparian states were put at 57 per cent for MP, 27 per cent for Maharashtra and 16 per cent for Gujarat.[24] The power benefits are meant to ensure that the extensive irrigation water benefits to Gujarat are somewhat counter-balanced with a more favourable allocation of power to the two states facing most of the submergence. This, however, begs the question of the interests of the people

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19 Report of the Narmada Water Resources Development Committee, Government of India, Ministry of Irrigation and Power (Khosla Report), 1 September 1965 [hereafter Khosla Report].

20 *See, e.g.*, Report of the Five Member Group, partly reproduced below at page 357 [hereafter Five Member Group] indicating at paragraph 3.2.3 that observed data for 1948 to 1988 gives a 75 per cent dependable yield of 22.9 MAF and that actually observed flows, whether for 20 years as at the time of the Tribunal's assessment or for 40 years are only around 23 MAF.

21 According to Section 5(3), Inter-State Water Disputes Act, 1956, above note 13.

22 *Cited in* D'Souza, above note 7 at 155.

23 Brief Record of Decisions Taken in the Meeting of Chief Ministers on Sardar Sarovar Project Convened by the Honourable Prime Minister on 15 July 1996 and 16 July 1996, New Delhi, available at http://www.ielrc.org/content/c9601.pdf.

24 NWDT Award, Clause VIII, reproduced below at page 47.

of MP and Maharashtra. The rationale for the dam, as many times restated is to provide irrigation and drinking water to water-scarce areas of Gujarat. In other words, it is clearly understood that power generation is only an additional benefit of the dam. If irrigation and drinking water are the main expected benefits from the dam, oustees would be expected to get a share of these irrigation and drinking water benefits. The fact that oustees should benefit from the project that is uprooting them is increasingly recognised. Further, it is not out of step with the original planning of the SSP since the Khosla report suggested that oustees should get lands provided with irrigation as well as villages with safe drinking water, roads and schools.[25]

The NWDT Award paved the way for the actual implementation of the project. While construction had officially started in 1961 when Jawaharlal Nehru laid the foundation stone, it is in fact only after the NWDT Award that actual final planning and work on what is today the SSP started. Besides the NWDT Award allowing the Gujarat Government to implement the project, the next event that actually kick-started the project was the World Bank agreeing in 1985 to provide $450 million to finance the construction of the dam and canal network.[26] The involvement of the World Bank was crucial in many respects as it was involved in the final planning for the project during the early 1980s while it was reviewing its suitability for funding.[27] Further, the sanction of a World Bank loan was crucial in imparting a seal of approval on the project that paved the way for the involvement of other transnational actors, such as the Sumitomo Corporation of Japan providing turbines for the project.[28] The involvement of the World Bank also internationalised the project and contributed to the development of a worldwide civil society interest in the SSP and other Narmada dams.

The actual start of the construction also led future oustees to progressively become aware of their destiny. This period coincided with the development of various efforts to ensure that oustees would be at least entitled to the minimum package offered in the NWDT. Among the different groups that started working with

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25 Khosla Report, reproduced below at page 41 at 4.

26 Various agreements were signed with India and the states. *See, e.g.,* Development Credit Agreement (Narmada River Development (Gujarat) Sardar Sarovar Dam and Power Project) between India and International Development Association, Credit No. 1552 IN, 10 May 1985, reproduced below at page 411 and Gujarat Project Agreement (Narmada River Development (Gujarat) Water Delivery and Drainage Project) between International Development Association and State of Gujarat, 10 May 1985, Credit Number 1553 IN, available at http://www.ielrc.org/content/c8501.pdf.

27 World Bank involvement actually started as soon as the NWDT had crafted an acceptable compromise in 1978. *See* T. Scudder, India's Sardar Sarovar Project (SSP) 10 (unpublished manuscript, 2003).

28 Sardar Sarovar Construction Advisory Committee, Hydropower Complex, available at http://www.sscac.gov.in/m_hydro.html.

oustees, most seem to have at first tried to engage with the project promoters to ensure complete resettlement and rehabilitation. While some organisations like Arch Vahini stuck to this stance,[29] other organisations that eventually coalesced under the single banner of the Narmada Bachao Andolan (NBA) ended up taking a stronger stance against the building of the dam itself, having come to the conclusion that the project could not be realised in such a way as to provide full resettlement and rehabilitation to all oustees.[30] The increasing level of opposition to the dam and the way in which resettlement was being planned and executed was influenced in no small part by the lack of participation of oustees in the development and planning of the project as well as the lack of information regarding the project and ensuing displacement.

By the beginning of the 1990s, the NBA and allied organisations within the country and abroad had made a sufficiently well argued case for their claims. Eventually, the pressure on the World Bank became such that it commissioned the first ever independent review of an ongoing project. The resulting assessment, the Morse Report, was blunt in its assessment of the situation. The two authors opined that:

> [w]e think the Sardar Sarovar Projects as they stand are flawed, that resettlement and rehabilitation of all those displaced by the Projects is not possible under prevailing circumstances and that the environmental impacts of the Projects have not been properly considered or adequately addressed. Moreover, we believe that the Bank shares responsibility with the borrower for the situation that has developed.[31]

At first, the 1992 Morse Report was not well received as witnessed in the reactions of the Government of India and the Government of Gujarat.[32] Nevertheless, it did trigger the eventual pull-out of the World Bank from the project in 1993. World Bank reports commissioned after the pull-out confirmed that the bank accepted that

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29 The 1987 resolutions of the Government of Gujarat modifying the resettlement and rehabilitation package for oustees in Gujarat led a split in the NGO movement where some organisation like Arch Vahini endorsed it while others did not. *See* Dwivedi, above note 16 at 157.

30 *Cf.* S. Parasuraman, 'The Anti-Dam Movement and Rehabilitation Policy', *in* Jean Drèze et al eds, *The Dam and the Nation – Displacement and Resettlement in the Narmada Valley* 26 (New Delhi: Oxford University Press, 1997).

31 Bradford Morse & Thomas R. Berger, *Sardar Sarovar – Report of the Independent Review* xii (Ottawa: Resource Futures International, 1992), section reproduced below at page 331.

32 *See respectively* Letter from Mr Chitale, reproduced below at page 353 and Government of Gujarat, Comment on the Morse Report, partly reproduced below at page 355.

there had been major shortcomings in this project, including failure to follow its own guidelines.[33]

The involvement and subsequent withdrawal of the World Bank from the project are landmark events from the point of view of the SSP but also from a broader perspective. The involvement in the SSP was, by all accounts, one of the biggest public relations disasters for the World Bank.[34] As a result, a number of initiatives were taken to ensure that similar problems would not resurface. One of the first internal initiatives was the setting up of the Inspection Panel, an internal accountability body.[35] This provides an avenue for individuals and groups to seek redress for breaches by the World Bank of its own operational policies and procedures in the context of a project it finances. Another (indirect) consequence of the SSP fiasco was the setting up of the World Commission on Dams (WCD), an attempt to rebuild a consensus among all concerned actors at the international level to ensure that big dam construction would not be marred by further controversies of the same magnitude. The 2000 WCD report confirmed that the construction of big dams was acceptable but emphasised that project promoters needed to fulfil various obligations, for instance, from the point of view of human displacement and environmental protection.[36] Since 2000, there has indeed been renewed interest in big dams in international policy-making circles. This has led to the reformulation of the rationale for big dams in the World Bank 2004 Water Strategy. The latter provides that of the four effective water resource development mechanisms that play a central role in sustainable growth and poverty reduction, 'major infrastructure such as dams and inter-basin transfers, provide national, regional and local benefits from which all people, including poor people, can gain'.[37]

After the World Bank withdrawal from the project, the development of the SSP took a different turn. While international funding had been withdrawn, it was

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33 *See, e.g.*, World Bank, Project Completion Report, partly reproduced below at page 422 at § 25.

34 *See, e.g.*, Environment Defense Fund, "Institutional Amnesia": The World Bank's Approach to High-Risk Projects (2003), available at http://www.environmentaldefense.org/documents/3008_Gambling_Amnesia.pdf. The recent World Bank Water Resources Sector Strategy still acknowledges that '[s]ome of the World Bank's greatest and most publicized failures have involved the financing of dams that were planned and built without sufficient attention to social and environmental consequences'. World Bank, Water Resources Sector Strategy – Strategic Directions for World Bank Engagement 8 (Washington, DC: World Bank, 2004) [hereafter Water Resources Strategy].

35 The World Bank Inspection Panel, Resolution No. IBRD 93-10, 34 *International Legal Materials* 503 (1995).

36 World Commission on Dams, *Dams and Development – A New Framework for Decision-Making* (London: Earthscan, 2000).

37 Water Resources Strategy, above note 34 at 2.

decided to pursue the implementation of the project with domestic resources. The remainder of the year 1993, after the withdrawal of the World Bank, was marked by the submergence of Manibeli, the first village in Gujarat to be fully drowned by the dam during the 1993 monsoon. Manibeli's submergence coming within a few months of the World Bank's withdrawal led the NBA to step up its campaign by launching a call for *jal samarpan* or sacrifice by drowning.[38] Eventually, in the face of mounting opposition at home and abroad, the Ministry of Water Resources appointed the Five Member Group (FMG), a group of five experts were asked to 'continue the review discussions initiated during and of June, 1993 on all issues related with the Sardar Sarovar Project'.[39] The FMG process was, on the whole, an attempt to determine how far local experts would concur with the conclusions of the Morse Report. While the terms of reference were relatively narrow and the five members had been chosen by the government, the FMG process led to significant resentment. The constitution of the FMG was thus challenged in the High Court of Gujarat by the Narmada Abhiyan (Narmada Campaign) requesting among other things the setting aside of the Water Ministry's Memorandum and restraining the government from releasing the report to the public.[40] The High Court passed an order in October 1993, which substantially restrained the government from releasing the report to the public until further orders. This was challenged in the Supreme Court, which eventually declared in December 1994 that the report should be published.[41] The report that was eventually released substantially concurred with the Morse Report though in less vigorous terms.[42] A further report by the FMG was submitted in response to a Supreme Court order requesting further views from the group on hydrology, on the height of the dam, on resettlement and rehabilitation of oustees and on the environment.[43] The report submitted in April 1995 by four of the original five members addressed in further detail the requests of the Supreme Court.[44] It could not be adopted unanimously because the members significantly disagreed on issues such as the need to reduce

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38 *See, e.g.*, The Narmada Sardar Sarovar Project Mass Arrests and Excessive Use of Police Force Against Activists in Central India (Report of the Narmada International Human Rights Panel, October 1993).

39 Ministry of Water Resources, Office Memorandum, No. 6/4/93-PP, 5 August 1993.

40 Special Civil Application No. 9366 of 1993, *Narmada Abhiyan and others v. Government of India and others*.

41 *Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No 319 of 1994, Supreme Court of India, Order of 13 December 1994.

42 Five Member Group, above note 20.

43 *Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No 319 of 1994, Supreme Court of India, Order of 24 January 1995.

44 Ramaswamy R. Iyer, L.C. Jain, V.C. Kulandaiswamy, Vasant Gowariker, Further Report of the FMG on Certain Issues Relating to the Sardar Sarovar Project, April 1995, available at http://www.ielrc.org/content/c9505.pdf.

the height of the dam and on the need to further review the project in view of the problems identified with resettlement and rehabilitation.[45]

From the point of view of the NBA, the withdrawal of the World Bank was both a boon and a challenge. From March 1993 onwards, much less international pressure could be applied on the Central and State governments. Eventually, in view of the difficulties faced in making itself heard, the NBA decided to have recourse to public interest litigation, which had come to be seen by the mid-1990s as one of the best avenues for ensuring justice and securing the realisation of human rights. As a result, a petition was filed in 1994 in the Supreme Court. Since that day, the Supreme Court has been, in many respects, one of the main actors in the ever unfolding crisis that has been the construction of the SSP over the past couple of decades.

The NBA petition argued among other things that the assumptions on which the NWDT Award had been given in 1979 had significantly changed in the meantime. Further, it asserted that the NWDT had not considered all relevant issues and, in particular, that it had not given project-affected people an opportunity to make representations before it. The petition intimated that these omissions had led to a flawed project with grossly underestimated social and environmental costs, which could not be implemented as per the NWDT Award without serious violations of human rights and damage to the environment. In conclusion, it considered that a review of the project was urgently needed. More specifically, it asked the Court to either order a stoppage of the project and implement proposed alternatives or direct the Union of India to set a new tribunal to review the project which would include participation of project affected people or that the Court should set up an independent team to review the whole project.[46]

Judicial intervention by the Supreme Court has been marked by a series of different stands on the SSP. In May 1994, the Court first declined to stop construction of the dam.[47] A year later, the Court agreed to the suspension of the work on the project and maintained this stance for four years.[48] After 1998, the Court progressively hardened its position. It first authorised the resumption of work on the project in 1999 and eventually, in its main judgment of October 2000, castigated the NBA for having approached the Court too late and gave the

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45 *Id*. at Section 2.5 and 'A Note by Ramaswamy R. Iyer'.

46 *Narmada Bachao Andolan v. Union of India and Others*, Supreme Court of India, Writ Petition (Civil) No. 319 of 1994.

47 *Narmada Bachao Andolan v. Union of India and Others*, Writ Petition (Civil) No 319 of 1994, Supreme Court of India, Order of 20 May 1994.

48 Order of 5 May 1995, reproduced below at page 127.

government a renewed stamp of approval to complete the project as fast as possible.[49]

While the 2000 judgment only placed minimum constraints on the government to ensure that 'the project is completed as expeditiously as possible',[50] it still imposed that construction should happen in stages and that each stage should only be undertaken after all oustees were effectively resettled (the *pari passu* condition).[51] This has been the basis for further petitions focusing not any more on the whole project but more specifically on the resettlement and rehabilitation of oustees. In particular, petitions have been brought to the Court by individual oustees of MP and by the NBA showing that resettlement and rehabilitation had not taken place as per the NWDT Award and the Court's own 2000 judgment. In a petition of 2002, the Supreme Court first refused to interfere, arguing that issues of resettlement and rehabilitation were best dealt with by the Grievance Redressal Authority (GRA).[52] The case was nevertheless successfully brought back to the Court and following the order of the GRA of MP in September 2004,[53] the Supreme Court gave a further judgment in 2005, which was quite critical of the resettlement and rehabilitation process.[54] In other words, five years after a judgment which was meant to provide for the construction of the dam while ensuring full resettlement for oustees and compliance with environmental conditions, the same Court acknowledged that this had not actually taken place in practice.

Since the 2005 judgment, the pendulum has again swung rapidly towards ensuring that the dam is completed at the earliest, regardless of the various conditions set by the NWDT Award and the Supreme Court earlier. The year 2006 witnessed what will probably be one of the last major confrontations to ensure that the construction of the dam is effected according to all the conditions set in the various relevant legal instruments. The political and legal battle was triggered by the decision of the NCA to authorise the construction of an additional 10 metres of the dam up to 121.92 metres in March 2006, which will lead to the displacement of an estimated 17,255 families. While the NCA gave its clearance on 10 March 2006, the Union Water Resources Minister, Saifuddin Soz, immediately decided to put the decision

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49 *Narmada Bachao Andolan v. Union of India*, Writ Petition (Civil) No. 319 of 1994, Supreme Court of India, Judgment of 18 October 2000 (Justice Kirpal and Justice Anand), reproduced below at page 138 [hereafter majority judgment].

50 *Id.* § 280.

51 On *pari passu*, see below page 28.

52 *Narmada Bachao Andolan v. Union of India and Others*, Supreme Court, Writ Petition (Civil) No. 328 of 2002, Order of 9 September 2002, reproduced below at page 269.

53 Order of the GRA, reproduced below at page 270.

54 Judgment of 15 March 2005, reproduced below at page 277.

on hold.[55] The decision was put on hold in an attempt to diffuse tension but no specific action was taken to ensure that construction would not take place. As a result, construction was not actually halted.[56] The NBA thus organised from 17 March a dharna in New Delhi, first outside the Water Resources Ministry, then at Jantar Mantar. In view of the lack of response of the government, three NBA activists, Bhagwatibehn, Jamsingh Nargave and Medha Patkar, started an indefinite hunger strike.

This led to a chain reaction in official circles. First, the government sent three ministers to assess the state of resettlement and rehabilitation. Their report given to the government on 9 April was quite critical of the situation on the ground. The Supreme Court was then given opportunities to intervene in the matter since a hearing on fresh petitions by oustees was in any case scheduled. On 17 April, the Court refused to stop the construction of the dam but warned it would do so if rehabilitation was found to be inadequate. The Court, having declined to take action, indicated that it should be an issue for the Prime Minister to resolve, in accordance with some of the directions the Court had given in its 2000 judgment. The Prime Minister was not inclined to take a decision either way and instead requested on 24 April the setting up of yet another committee, the Shunglu Committee, to look into the resettlement and rehabilitation issue. Subsequently, in two further hearings on the SSP on 1 and 8 May, the Supreme Court refused again to suspend the NCA decision. The report of the Shunglu Committee given in early July was sympathetic to the claims of the states that the situation is generally satisfactory with regard to resettlement and rehabilitation. Yet, in the subsequent hearing at the Supreme Court on 10 July, a 'compromise' position was adopted. The dam, which had already been built from 110 metres to 119 metres since March 2006, was not to be built up to 120.92 metres until resettlement and rehabilitation at 119 metres was complete. Without any further approval from the Supreme Court in the meantime, the construction of the dam up to 121.92 metres was completed by December 2006.[57]

C. Rationale and Expected Benefits

The SSP is what is known as a multi-purpose project since it is meant to provide different types of benefits from drinking and irrigation water to electricity

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55 *See, e.g.*, Gargi Parsai, 'Centre Puts on Hold Decision on Narmada Dam', *The Hindu*, 11 March 2006.

56 *See, e.g.*, Saeed Khan, 'Narmada Dam Construction on Despite Delhi's «Instructions»', 10 March 2006, available at http://www.newkerala.com/news2.php?action=fullnews&id=26733.

57 *See* Advertisement, 'Gujarat Dedicates with Pride 1,450 MW Hydro Power of Sardar Sarovar Narmada Project to the Nation', *The Hindu* 19 January 2007, p. 16.

generation. However, it must be borne in mind that the SSP was, from the start, planned as a source of irrigation water. This is visible in the rationale for the Khosla master plan, which insists that requirements of irrigation should have priority over those of power.[58] This is also confirmed by the fact that the provision of drinking water only became a significant component of the project in later years. In other words, the SSP was from the start planned as a project that would help solve the water problems of water-scarce areas of Gujarat and Rajasthan.[59]

The general rationale to bring water to water-scarce areas can be looked at from different angles. Thus, the first justification was the perceived need after independence to extend irrigation so as to ensure aggregate food security for the country.[60] According to Justice Kirpal, this remains a primary rationale for big dams since 'large-scale river valley projects per se all over the country have made India more than self-sufficient in food'.[61] Another justification was an attempt to settle farmers in regions bordering Pakistan, an objective that was at least as much based on military strategy objectives as on food security.[62] To this are added the generation of electricity and the provision of drinking water to a large part of Gujarat. A number of other reasons have been added over time. Justice Kirpal argues, for instance, that the displacement of oustees should be seen as a favour made to them since '[i]t is not fair that tribals and the people in undeveloped villages should continue in the same condition without ever enjoying the fruits of science and technology for better health and have a higher quality of life style'.[63] Similarly, he argues that while a dam displaces more people than a thermal power plant, the cost of electricity generation is lower and it is ecologically friendly from the perspective of global warming.[64] The SSP has also been justified on its potential for fostering tourism in the Narmada valley. Not only is the dam itself, a new 'temple of engineering', seen as a tourist attraction but it is argued that the water released by the dams will improve the flow of 'clean running water' at the bathing ghats for pilgrims.[65]

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58 Khosla Report, above note 19 at 210.

59 *See, e.g.*, R. Rangachari et al., 'Some Agreed Conclusions', *in* Shekhar Singh and Pranab Banerji eds, *Large Dams in India – Environmental, Social & Economic Impacts* 273 (New Delhi: Indian Institute of Public Administration, 2002).

60 Khosla Report, above note 19 at 210.

61 Majority judgment, above note 49 at § 265.

62 Note that this objective finds an echo in the majority judgment, above note 49 at § 262.

63 Majority judgment, above note 49 at § 267.

64 *Id.* § 278.

65 *See* Narmada Planning Agency, Government of Madhya Pradesh, Development of Recreational, Tourist, Sports and other Social and Community Facilities in the Basin (1984).

Before turning to expected benefits, it is apt to briefly scrutinise project costs. While an overall assessment of the project should go beyond economic costs and benefits, these are still fundamental as the project is meant to be financially viable. The various figures given by different analysts over time may not necessarily be fully comparable. Nevertheless, they clearly point out that one of the main characteristics of the overall costs of the SSP is that they have grown exponentially over time. In 1983, costs were estimated at Rs 4,877 crore by Tate Economic Consultancy Services.[66] In 1985, the World Bank put the total cost at Rs 13,640 crore. By 1992, according to estimates of the Gujarat Government it was Rs 20,470 crore.[67] In 1994, other figures based on World Bank estimates put the total cost at Rs 34,000 crore.[68] By 2006, the Government of Gujarat had spent Rs 21,411.81 crore on the project.[69] Two brief comments can be made on these figures. Firstly, aggregate figures by themselves point to problems in the overall planning of the project. The fast increasing costs of the project not only threaten its overall economic viability but have also led, in the words of an analyst to the 'economic insolvency that plagues the project'.[70] Secondly, even if the cost estimates made in the 1980s were accurate and made the project economically viable at the time of the World Bank assessment, this has in fact always been a fiction. Estimates of the total costs of the project presented here do not include the huge expenditure on the drinking water component, which has, for all practical purposes, been planned only in the past 15 years.[71]

While it is impossible today to provide accurate estimates of the total benefits that will accrue during the project lifetime, it is certain that the project was conceived as being financially viable on the basis of earlier estimates that are completely out of step with actual costs. This therefore begs the question of alternatives to the SSP. Could similar benefits have been achieved through smaller projects rather than a gigantic scheme? The answer is that without any doubt there are alternatives which could have been considered and that could have delivered similar benefits at a much lower cost. One such alternative is the proposal by Paranjape and Joy that would ensure the delivery of the same amount of water authorised by the NWDT

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66 Sanjay Sangvai, *The River and Life – People's Struggle in the Narmada Valley* 13 (Mumbai: Earthcare Books, revised ed. 2002).

67 Amita Baviskar, *In the Belly of the River – Tribal Conflicts Over Development in the Narmada Valley* (New Delhi: Oxford University Press, 2nd ed. 2004).

68 Sangvai, above note 66 at 27.

69 Rajya Sabha, Starred Question No 558, Construction of Narmada Dam near Kevadia. Response of the Minister of Water Resources (Prof. Saif-Ud-Din Soz) of 23 May 2006.

70 Himanshu Upadhyaya, 'Sardar Sarovar Project – Dubious Record', 23/10 *Frontline* 42 (2006).

71 For more details on the drinking water component, see below at page 18.

but with a much lower dam that would reduce submergence by two-thirds.[72] While the NWDT did not, as such, consider alternatives to the SSP, it had to address the claims of MP and Maharashtra, which wanted to build a dam at Jalsindhi. The construction of the Jalsindhi dam would have drastically limited the size of the SSP but, at the same time, the area coming under submergence would have been reduced from an estimated 36,400 ha for the SSP to 14,600 ha with the two smaller dams and the submergence of cultivable area reduced from 12,000 ha to 1,440 ha.[73] The ultimate power generation of the two dams would also have been higher than for the single SSP.[74] Despite finding the two smaller dams attractive from a submergence and power generation point of view, the NWDT found that both reservoirs were too small and that all excess inflows of surplus years from the entire catchment area below the Indira Sagar Pariyojana (ISP) would go to waste to the sea. Further, the NWDT determined that with a lower dam, irrigation benefits would be substantially reduced and that irrigation in Rajasthan could only be through lift irrigation.[75] This again confirms the importance of irrigation in the decision to build the high SSP dam that is being built today and that these benefits were put above other considerations such as displacement and submergence of arable land.

The benefits of the project are meant to be so large for Gujarat and her people that the project has been nicknamed 'Gujarat's lifeline'.[76] In fact, the extent of benefits and their distribution within Gujarat remains a matter of intense debate. While the project has always been premised on the benefits it would bring to water-scarce areas,[77] an unavoidable aspect of the project is that the main canal first runs through fertile and highly developed parts of the state. It has not remained unnoticed to people living in areas close to the dam that large-scale benefits could be derived from the additional water coming from the Narmada river. This probably explains why the setting up of several sugar factories has been reported in the command area of the first part of the main canal.[78] More generally, industries

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72 *See, e.g.*, Suhas Paranjape & K.J. Joy, 'Alternative Restructuring of the Sardar Sarovar: Breaking the Deadlock', 41/7 *EPW* 601 (2006).

73 Report of the Narmada Water Disputes Tribunal with its Decision in the Matter of Water Disputes Regarding the Inter-State River Narmada and the River Valley Thereof Between the States of Gujarat, Madhya Pradesh, Maharashtra and Rajasthan (New Delhi: Government of India, vol. 2, 1979).

74 *Id.* § 13.5.1.

75 *Id.*

76 *See, e.g.*, Dionne Bunsha, 'Heights of Intolerance', 23/11 *Frontline* 108 (2006).

77 *See, e.g.*, Lyla Mehta, 'Manufacture of Popular Perceptions of Scarcity: Dams and Water-related Narratives in Gujarat', 29/12 *World Dev.* 2025, 2028 (2001) indicating that the 1972 Irrigation Commission on Narmada Waters stressed the importance of providing Narmada water to scarcity areas of Gujarat irrespective of what share of Narmada waters would be allocated to Gujarat.

78 Sangvai, above note 66 at 114.

are expected to be major beneficiaries of the project.[79] The tension between the benefits that people in water-scarce areas expect from Narmada waters and the lure of additional benefits for people living in already prosperous areas benefiting from relatively adequate water availability has been a long-standing issue. This is, for instance, reflected in the ongoing public interest litigation initiated by the Kachchh Jal Sankat Nivaran Samiti, an organisation representing the interests of the people of the Kachchh district of Gujarat to request additional water allocation for the district which constitutes on its own about a quarter of the size of the state and is 100 per cent drought-prone and whose relief has been consistently used as a justification for the SSP.[80] Yet, the planned allocation of Narmada waters for Kachchh is only 2 per cent.[81] It is a telling fact that more than 40 years after the Khosla report and a couple of decades after implementation of the project started, the issue of who within the beneficiary state will benefit is still the object of severe disagreements. The fact that the government does not seem ready to allocate more water to the poorer and more drought-prone areas of the state seems to indicate that concerns over the possibility that most water will be appropriated by people and industries living in the first part of the command area rather than preferentially channelled to poorer and more water-scarce areas of the state have not been unfounded.

Moving beyond Gujarat, two main inter-state aspects need to be considered with regard to the benefits of the SSP. Firstly, while MP and Maharashtra get no or limited water allocation out of the SSP, they are meant to be partly compensated for the submergence of parts of their territory with a higher allocation of power benefits. Keeping in mind that the main rationale for the SSP is the provision of water to foster food security through irrigation, it appears that neither of the two states benefit at all. While the concerned states themselves seem to have generally accepted this, it is an element which needs to be borne in mind when analysing the SSP on the whole. MP, the state that sees a significant part of its territory submerged by the SSP is rewarded by power benefits, which will, as intended in the planning of the project itself, rapidly diminish over the lifetime of the project. In view of the Khosla report's insistence on the need to make the national interest prevail, it can be argued that MP is doing this for the broader common good. Yet, it is unsure whether the people of MP, not just people who are ousted by the dam, can ever make sense of this decision. It is indeed extremely unlikely that the food security and economic benefits that will accrue to Gujarat will ever trickle down to benefit the broader population of MP. In the case of the SSP, there is a clear inter-state dimension to the distribution of benefits and costs, which contributes to highlighting this issue. However, the same would be true of other dams on the Narmada situated wholly within MP or other dams elsewhere. The costs borne by

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79 Dwivedi, above note 16 at 123.

80 *Kachchh Jal Sankat Nivaran Samiti v. State of Gujarat*, reproduced below at page 105.

81 Five Member Group, above note 20 at paragraph 3.3.3.

one part of a region, state or country are usually justified in terms of the benefits that this brings to the broader polity. However, as further analysed below with regard to oustees, it is relatively difficult to justify 'costs' like displacement where the project planners do not ensure that oustees are among the first to benefit from the project, for instance, through relocation in the command area of the project.

The second inter-state element refers to the broader plan for the SSP. From the start, it was always planned that the SSP would only deliver its expected benefits if it was built alongside the similarly very large ISP.[82] There are therefore physical links between the two projects since the non-completion of ISP would have had important consequences on the expected benefits of the SSP. This explains why Gujarat was made to pay 17.63 per cent of the costs of ISP.[83]

There are three main benefits expected from the SSP. These are irrigation water, drinking water and power generation. The irrigation benefits constitute, as mentioned above, the main justification for the dam. If everything goes according to plan, the dam will feed a network of canals comprising a 458 km long main canal up to Gujarat-Rajasthan border, 42 branch canals, 7,500 km of distributaries, and nearly 30,000 km of minors and sub-minors. The network distribution system is planned to eventually have an aggregate length of about 75,000 km. In keeping with the project rationale, which is to bring irrigation water to water-scarce areas of Gujarat as well as to some areas of southern Rajasthan, the main canal is planned to extend for another 74 km into Rajasthan. The reservoir of the SSP is planned as having a gross storage capacity of 0.95 million hectare metres and a live storage of 0.58 million hectare metres. This is meant to provide irrigation to about 1.80 million hectares in about 3,400 villages in Gujarat, 75,000 ha in arid areas of Rajasthan and 37,500 ha (by lift irrigation) in Maharashtra. Overall, this would make it the largest irrigation project in the world.[84] At this juncture, it is not possible to make a full assessment of the irrigation component of the SSP. This is because the canal network is not complete. Further, the irrigation component has been marred by institutional delays, for instance, in the setting up of water user associations at the local level, which are a prerequisite for the availability of Narmada water.

The provision of drinking water to villages and towns in Gujarat has become another central component of the project. There is no doubt that the provision of drinking water to water-scarce parts of Gujarat is a major benefit from a project like the SSP. Nevertheless, this part of the project also raises a number of questions. Firstly, the drinking water plan appears to be an afterthought. In fact, it

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82 The ISP was commissioned during the financial year 2004-2005.

83 NWDT Award, Clause X, reproduced below at page 47.

84 Scudder, above note 27 at 8.

was only effectively taken up after 1990.[85] Indeed the Morse Commission still found that the plans for the delivery of water to drought-prone areas of Gujarat were in the earliest stages of development.[86] Even by 1994, as indicated by the Five Member Group, there was very little clarity on the drinking water component and its implementation.[87] Secondly, as mentioned above, the huge drinking water scheme, which is being implemented at present to bring Narmada water to villages all the way to coastal villages in Saurashtra and elsewhere, is not actually part of the cost of the SSP. This is in fact a separate project whose cost should be added to the overall cost of the SSP when attempting to calculate costs and benefits.[88] These are very substantial costs since the capital costs of the water supply scheme are now estimated at Rs 8,026 crores.[89] Thirdly, the lack of clarity on the drinking water component is not only because planning started very late but also that the scheme itself seems to be regularly changing. Thus, the number of villages and towns to be served by the drinking water component seems to be regularly growing. This increased from no allocation in the 1970s to 4,270 villages in 1983–84, 7,235 in 1990, 8,215 during the 1990s to reach the current figure of 9,633 villages and 131 towns.[90] However, what looks like ever increasing benefits of the SSP for the people of Gujarat is not free from controversy. Indeed, as witnessed through the ongoing litigation concerning drinking water benefits for the Kachchh region, it is not necessarily the regions that gave the project its rationale in the first place that get preferential allocation of project benefits.[91]

The third main, though ancillary, benefit of the SSP is electricity generation. This is achieved through an underground River Bed Power House, which should provide a peak of 1,200 megawatts capacity, and a surface Canal Head Power House providing a maximum of 250 megawatts capacity. With regard to hydropower generation, the main question that arises is that of the actual benefits that will accrue to MP and Maharashtra. Indeed, while there will be 1,450 megawatts of installed capacity, it has been estimated that actual power generation will only be 425 megawatts in the early stages of the project, diminishing to 50 megawatts by the time all the water allocation for Gujarat is used for irrigation.[92]

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85 Indira Hirway & Subhrangsu Goswami, Concurrent Monitoring of the World's Largest Drinking Water Pipeline Project – A Study of Narmada Based Project in Gujarat (Ahmedabad: Centre for Development Alternatives, 2006).

86 Morse & Berger, above note 31 at xxiii.

87 Five Member Group, above note 20 at Section 3.4.

88 *See, e.g.*, Himanshu Upadhyaya, 'Sardar Sarovar Project – Dam Minus Drinking Water', *The Hindu*, 16 April 2006.

89 Padmaparna Ghosh & S.V. Suresh Babu, '907 KM from Parliament', *Down to Earth* 15 May 2006, p. 23.

90 *See* Sangvai, above note 66 at 119 and Hirway & Goswami, above note 85 at 2.

91 *Kachchh Jal Sankat Nivaran Samiti v. State of Gujarat*, reproduced below at page 105.

92 Sangvai, above note 66 at 121.

D. Issues Raised

The SSP is not only a vast project, it is also a project that creates an extensive submergence zone. In fact, the reservoir is of such proportions that it will extend up to 214 km upstream from the dam. This can be explained by the fact that while the dam itself and the first part of the submergence zone is in a comparatively hilly area, the tail end of the reservoir is by and large a plain area. This explains that each additional metre of dam construction at this juncture has such important consequences in terms of displacement. It also explains why there could have been heated arguments as late as the mid-1990s over the reduction in height of the dam by only 19 ft since this would have made a big difference in terms of submergence and displacement.

1. Displacement

The submergence created by the dam has a number of direct and indirect impacts. From a human development point of view, there is, however, no greater impact than the ousting of hundreds of thousands of people. The fact that ousted people should be resettled by the state has not been a real issue over the past few decades. However, behind what may look like a consensual position on the basic moral and legal obligation of the state, there are a host of mostly unresolved problems. These include a variety of issues ranging from the definition of who is an oustee to the type of resettlement and rehabilitation package.

The first issue, which is still the object of debate, is the most basic one, the number of people who are displaced by the dam. When the NWDT Award was given, only estimates of the number of oustees were available. It was estimated at that time that only 6,147 families were to be displaced.[93] This is, therefore, the basis on which the economic viability of the project was determined. In the mid-1980s, the Department of Environment and Forests put the total at 66,675 people (or about 13,335 families).[94] By the early 1990s, the Five Member Group gave a figure of 40,245 families affected by the SSP.[95] In 2000, the Supreme Court acknowledged a figure of 40,827.[96] Today, estimates range from about 40,000 (about 200,000 people) to about 100,000 families displaced (about 500,000 people).[97]

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93 NWDT Award, Clause IV(1), reproduced below at page 47.

94 Department of Environment & Forests, Environmental Aspects of Narmada Sagar and Sardar Sarovar Multi-purpose Projects (1986), available at http://www.ielrc.org/content/c8601.pdf.

95 Five Member Group, above note 20 at paragraph 5.3.

96 Majority judgment, above note 49 at § 83.

97 Scudder, above note 27 at 3.

Different reasons explain the differences in human count. Firstly, earlier estimates were just that, estimates that were not backed by actual door-to-door surveys.[98] Secondly, not all people ousted by the SSP are actually recognised as oustees. Thus, people ousted by the construction of the canal network do not fall under the protection offered by the NWDT Award.[99] Yet, this is a very substantial number of people, with estimates ranging from 140,000 to 170,000 farmers affected.[100] Thirdly, there are debates over the definition of oustees since it is only people who can show that they own land who get the full benefit of the resettlement and rehabilitation package. This has proved immensely problematic in the adivasi areas where people have technically been encroachers for generations. Further, this excludes all families whose main livelihood is not agriculture and therefore do not occupy land, such as fisherpeople, river bed farmers or boat people.[101] Fourthly, the NWDT accepted that every major son should be treated as a separate family. This was earlier contested by MP and Maharashtra.[102] More recently, the main issue has been the time lag between surveys and resettlement, which led to a situation where many people who are today major sons may not have been adults when the surveys were first undertaken. Fifthly, the fate of people whose livelihood depends on the water of the Narmada downstream of the dam has not been effectively addressed. This includes, for instance, an estimated 5,000 families of the fishing community who are likely to be deprived of their means of livelihood once the project is completed.[103]

It is not only the huge number of people displaced that attracts attention. Underlying concepts and principles concerning displacement also warrant analysis. As such, the very fact of displacing people in the name of economic and social development benefits may be an unacceptable proposition unless very strict safeguards are introduced. Thus, as acknowledged even in the early Khosla Report, oustees should at the very least be provided with lands falling under the command area of the project that is displacing them so that they actually benefit from the project that is severely affecting their lives.[104]

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98 *See also* Morse & Berger, above note 31 at xv indicating that even in 1985, 'when the credit and loan agreements were signed, no basis for designing, implementing, and assessing resettlement and rehabilitation was in place. The numbers of people to be affected were not known; the range of likely impacts had never been considered; the canal had been overlooked'.

99 *See, e.g.*, Majority judgment, above note 49 at § 196.

100 *See* Tata Institute of Social Sciences, The Sardar Sarovar Project: Experiences with Resettlement and Rehabilitation' (Mumbai: TISS, 1993) and Dwivedi, above note 16 at 131.

101 Sangvai, above note 66 at 125.

102 Morse & Berger, above note 31 at xvii.

103 Dwivedi, above note 16 at 132.

104 Khosla Report, reproduced below at page 41 at 4.

The NWDT Award offers a resettlement and rehabilitation package, which is more progressive than what would have been available under the Land Acquisition Act, 1894. Yet, this does not mean that it is an appropriate package that meets the needs of all people affected by the project. In fact, this is not something that could have been expected to come out of the NWDT process since it was nothing more than an inter-state procedure, which did not seek the participation of affected people.[105] Regardless of the merits and shortcomings of the NWDT Award, the real question today is whether the concerned authorities will comply with the clear terms of the Award. Compliance with the terms concerning the time frame for rehabilitation before submergence is one critical issue. Following the Award, the Supreme Court affirmed in 1992 that rehabilitation should be complete six months before actual submergence.[106] However, the orders of the Supreme Court of April and May 2006 seem to imply that this condition has all but been cast away, insofar as the Court allowed the construction to proceed despite affidavits and the report of the Group of Ministers showing that resettlement and rehabilitation was not complete.[107]

Compliance with the terms of the NWDT Award has been the object of significant debates in recent years with the introduction of the so-called special rehabilitation package. Under the gloss of the word 'special', what the Government of MP has tried to do since 2001 is to subvert the terms of the NWDT that provide land for land compensation.[108] The special rehabilitation package can be read as a desperate attempt by a government that has not been able to find land to resettle oustees to show at least minimal compliance with the terms of the NWDT Award. As proposed since 2001, the state acknowledges that it is unable to find enough land to resettle all oustees and that compliance with the NWDT Award would considerably slow down the project. As a result, it proposes to withdraw from the provision of land and give oustees money with which they can purchase land. The special rehabilitation package is in direct contravention to the NWDT Award directing land for land compensation. It also goes against the 2000 judgment that specifically commended the NWDT Award for going beyond the limited compensation scheme of the Land Acquisition Act.[109] In fact, even the Group of

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105 *Cf.* Morse & Berger, above note 31 at xv.

106 *B.D. Sharma v. Union of India*, Writ Petition (Civil) No. 1201 of 1990, Order of 9 August 1991, reproduced below at page 265.

107 *See, e.g.*, Affidavit of the State of MP, reproduced below at page 130 and Note of the Group of Ministers, reproduced below at page 314.

108 *See* Narmada Valley Development Authority, Proposal for Amending the Terms of Resettlement and Rehabilitation under NWDT, reproduced below at page 299, Narmada Control Authority, Consideration of Proposal for Special Rehabilitation Package, reproduced below at page 301 and Narmada Valley Development Department, Terms of Special Rehabilitation Package, reproduced below at page 302.

109 Majority judgment, above note 49 at § 179.

Ministers called for its cessation.[110] Nevertheless, the Supreme Court has failed to challenge its validity in recent orders. As a result, the Government of MP has made wide-ranging use of the special rehabilitation package in recent times.[111]

On the whole, the story of resettlement and rehabilitation in the context of the SSP is a failure from the perspective of the conditions that were laid down in the NWDT Award and elsewhere. While resettlement and rehabilitation in each of the three states where submergence is taking place has proved problematic, the situation in MP is the most problematic. This has been acknowledged in various documents. Justice Kirpal noted, for instance, that in the State of MP there 'seems to be no hurry in taking steps to effectively rehabilitate Madhya Pradesh PAFs in their home State'.[112] In fact, it has been directly or indirectly acknowledged at various points since 2000 that the Government of MP neither has enough cultivable land to resettle all oustees nor finds itself capable of purchasing land.[113] The Shunglu Committee referred to this problem and the report specifically stated that:

> the quality of land available in the Land Bank was by and large average; it was not irrigable and cultivable. Considerable efforts would be needed to bring it to standard of cultivable and irrigated land.[114]

It also indicated that the 'offer of government land in place of land acquired did not meet the requirements of PAFs'.[115]

A related issue, which has been problematic for many years, is the attempt to distinguish between temporarily affected (during the period of the monsoon only) and permanently affected oustees. This artificial distinction has been made to try to delay the point at which oustees need to be resettled. This has been condemned for many years.[116] In 2005, the Supreme Court clearly confirmed that no distinction

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110 Note of the Group of Ministers, General observation No. 4 reproduced below at page 314.

111 Thus, according to one monitoring report given in 2006, out of the 4,262 oustees entitled to land compensation covered in that report, 3,834 oustees (or 90 per cent of this group) have opted for the special rehabilitation package and 428 oustees have been allotted government land. *See* Narmada Control Authority, Resettlement and Rehabilitation Sub-group, Review of Status of R&R at Dam Height EL 121.92 m of the Sardar Sarovar Project (SSP), reproduced below at page 304.

112 Majority judgment, above note 49 at § 247.

113 *See, e.g.*, Narmada Valley Development Authority, above note 108 at § 2.

114 Report of the Sardar Sarovar Project Relief and Rehabilitation Oversight Group on the Status of Rehabilitation of Project Affected Families in Madhya Pradesh (Shri V.K. Shunglu Chairman) (2006) at § 2.19, available at http://www.ielrc.org/content/c0608.pdf, partly reproduced below at page 325.

115 *Id.* § 4.7.

116 *See, e.g.*, Report of the Fact Finding Team that Visited Narmada Valley and Relocation Sites in July 1994 (Usha Ramanathan, Rita Manchanda and Krishan Mahajan), available at http://www.ielrc.org/content/c9401.pdf.

should be made.[117] Yet, this does not seem to have been accepted by all concerned parties.

The failure of resettlement and rehabilitation also goes beyond the terms of the NWDT Award. This is the case, for instance, with regard to information and participation, as in situations where oustees were never informed about displacement until surveyors placing stone markers to indicate submergence level came to their village.[118]

More generally, it is noteworthy that strong criticism of the process of resettlement and rehabilitation in the SSP has come from a variety of agencies and quarters, including official sources and committees appointed by the government as well as a number of independent reports, commissions and committees. The overall picture, which emerges, is that apart from concerned authorities themselves asserting that they are complying with all their commitments, a majority of other sources, in addition to the NBA, contradict the official view.

Another issue that has attracted significant attention is the quality of the resettlement and rehabilitation package offered to oustees. Again, while concerned authorities tend to claim that all is well on this front, various official and independent reports have found major shortcomings with regard to proposed and existing resettlement sites. With regard to resettlement sites in MP, for instance, the Group of Ministers noted that:

> Dharampuri had been shown to the GoMs as a success story by the Madhya Pradesh Government and it turned out to be the worst example of not doing anything by way of settlement when there was apparently no difficulty in respect of resources. The people there showed to the GoMs two dry water pumps and a heap of stones that had been dumped there a day before the GoMs' arrival indicating that roads would be built soon.[119]

An independent team led by Professor Chenoy that visited several resettlement sites later in 2006 gives a similar picture.[120] Earlier, the Daud Committee that surveyed rehabilitation sites in Maharashtra found that:

> [e]xcepting the resettlement village of Simamli in Gujarat, which offers a little satisfaction, rest of the resettlement villages from Maharashtra in particular, visited by us, lack almost all the basic facilities required for habitation, specially quality and availability of suitable agricultural land. One cannot ignore the enormous number of complaints that the Committee came to hear from the aggrieved people about having been shifted to the new sites without being

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117 Judgment of 15 March 2005, reproduced below at page 277 at § 58.

118 Baviskar, above note 67 at 201.

119 Note of the Group of Ministers, Section on Dharampuri, reproduced below at page 315.

120 Chenoy, K.M et al., *Narmada Rehabilitation – Fact and Fiction* (New Delhi: Indian Social Institute, 2006).

> provided with compensatory agricultural land. One of the greatest shortcomings is that of non-availability of water even for domestic purposes like cooking and drinking. Even in Simamli, it is not as if everything is as it should be.[121]

Resettlement and rehabilitation also needs to be understood in a broader context. From a human rights perspective, displacement is a 'problem' and everything needs to be done to ensure that oustees' lives are affected as little as possible in a situation where there is a major upheaval in their lives. As noted above, even the 1965 Khosla Committee report noted that displacement was a 'major human problem'. Today, it is accepted that displacement is a human right issue.[122] However, this does not seem to have been accepted in the context of the SSP. The Secretary, Ministry of Water Resources thus asserted in 1992 that:

> [t]he basic right of human individuals is the one of development and that is what is being ensured through different development programmes including the water resources development programmes such as the Narmada Development Projects. There is, therefore, *no question of any violation of the human rights* when such projects are undertaken or implemented (emphasis added).[123]

In 2000, Justice Kirpal confirmed in his judgment that:

> the displacement of the tribals and other persons would not per se result in the violation of their fundamental or other rights. The effect is to see that their rehabilitation at new locations they are better off than what they were. At the rehabilitation sites they will have more and better amenities than which they enjoyed in their tribal hamlets. The gradual assimilation in the mainstream of the society will lead to betterment and progress.[124]

The implication is that displacement contributes to the realisation of oustees' human rights rather than causing a major upheaval. While a discussion of this position is beyond the scope of this chapter, it indicates that even in the twenty-first century there is in fact no consensus on what constitutes a human right and its realisation. While oustees' lives may in fact be improved from a socio-economic point of view *if* they are resettled in such a way that their overall lifestyle is improved, this does not lessen the trauma of displacement and should in fact be seen as the 'price' that the agency proposing displacement should be made to pay in return for deriving benefits from a project rather than as a 'benefit' for oustees. Further, it is inappropriate to talk about displacement as a favour done to adivasis who can henceforth benefit from new government services such as health and

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121 Justice S.M. Daud Report, partly reproduced below at page 377.

122 *See, e.g.*, Guiding Principles on Internal Displacement, *in* Report of the Representative of the Secretary General, Mr. Francis M. Deng, submitted pursuant to Commission resolution 1997/39, UN Doc. E/CN.4/1998/53/Add.2 (1998).

123 Letter from Mr Chitale, Secretary, Ministry of Water Resources to Mr Vergin, World Bank concerning the Morse Report, 1992, partly reproduced below at page 355 at § 4.

124 Majority judgment, above note 49 at § 91.

education.[125] All these services are in fact due to all citizens and should have been available to oustees earlier. It is therefore impossible to justify displacement in this way.

2. Environmental aspects

Environmental aspects of the SSP have also been controversial. The history of compliance with environmental conditions laid down by various agencies has been a story of controversies, which have in many cases not been resolved to this day.

In the context of the World Bank loan appraisal, limited consideration was given to environmental issues.[126] Even though environmental conditions were much weaker two decades ago than they would be today,[127] the Morse Report still found that '[m]ost of the Bank's 1985 legal requirements for the environment have not been met'.[128]

At the domestic level, one of the issues that has dominated the environmental agenda in the SSP is that of environmental impact assessment which has been recurrently brought back to the table. In 1983, clearance was rejected.[129] In the following years, the Ministry of Environment and Forests (MoEF) attempted to maintain pressure on project proponents to comply with environmental conditions and remained unwilling to grant clearance.[130] Eventually, in 1987 it agreed to give a 'conditional' clearance.[131] Since this clearance was only conditional, its validity was conditional on the intervention of the Prime Minister who is deemed to have sanctioned the project.

This is analysed in detail in the majority and minority judgments of the Supreme Court in 2000. Justice Kirpal speaking for the majority thought that the Prime Minister's note constituted an endorsement of the environmental clearance. On the contrary, Justice Bharucha writing the minority judgment thought that the decision should have been left to the MoEF. Further, his understanding based on the documents of the relevant ministries was that 'the requisite data for assessment of

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125 *See* Tata Institute of Social Sciences, above note 100 at 24.

126 Morse & Berger, above note 31 at 223.

127 *See* Section 9(b), World Bank, Operational Manual Statement: Environmental Aspects of Bank Work, OMS No. 2.36, May 1984.

128 Morse & Berger, above note 31 at 233.

129 *Id.* at 222.

130 *See, e.g.*, Department of Environment & Forests, above note 94.

131 Ministry of Environment and Forests Environmental Clearance, reproduced below at page 77.

the environmental impact of the project was not available when the environmental clearance thereof was granted'.[132]

In other words, without going beyond the analysis undertaken by Supreme Court judges, it becomes apparent that the actual clearance of the SSP from an environmental point of view is in question. This is in fact an issue which was taken up by MPs.[133] It should also be noted in this context that one of the reasons for the confusion surrounding the clearance can be partly traced back to the fact that the project was sanctioned for funding by the World Bank before environmental clearance was considered at the national level. This eventually put pressure on the MoEF to tone down its stand on the project.[134]

The question of environmental clearance becomes even more intricate once it is considered that the 1994 Environmental Impact Assessment Notification provided that any clearance was valid only for five years.[135] While the SSP was 'cleared' before the coming into force of the Notification, the fact that it has been an ongoing project for so many years at the very least raises the question of the need for a fresh clearance once the Notification was issued. The question of the lapse of any clearance given in the 1980s was in fact taken up by the NCA Environment Sub-group, which opined already in 1990 that the conditional clearance should be deemed to have lapsed.[136] In this context, recent changes to the environmental impact assessment framework are striking. A new Notification that supersedes the 1994 document was adopted in 2006.[137] It generally weakens the framework adopted a decade earlier. With regard to the validity of clearances granted for river valley projects, it not only lengthens the period of validity to ten years but also provides that it can be extended by another five years.[138] Regardless of the problematic aspects of this Notification that weakens existing environmental protection standards, this would not shield the SSP from the necessity to apply for a fresh clearance.

One of the critical conditions that was put down in the 1987 conditional clearance is the condition that remedial measures should be undertaken *pari passu*, or in

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132 *Narmada Bachao Andolan v. Union of India*, Writ Petition (Civil) No. 319 of 1994, Supreme Court of India, Judgment of 18 October 2000 (Justice Bharucha), reproduced below at page 228 [hereafter minority judgment].

133 *See* Parliamentary Questions on Environmental Impact Assessment, 1993, reproduced below at page 80.

134 *See, e.g.*, Dwivedi, above note 16 at 135 and Sangvai, above note 66 at 24.

135 Section III(c), Environmental Impact Assessment Notification, 1994.

136 Morse & Berger, above note 31 at 230.

137 Government of India, The Environmental Impact Assessment Notification, 14 September 2006, Gazette of India, Extraordinary, Part-II, and Section 3, Sub-section (ii) Ministry of Environment and Forests.

138 *Id*. at section 9.

other words at the same pace as construction work. Over time, this condition has become one of the most controversial issues of the legal framework covering the SSP.

The *pari passu* condition has been at the centre of debates at various stages of the project. Thus, when it was proposed to close the sluice gates of the dam in 1994, the NCA Environment Sub-group recommended that works should be halted because it was concerned over the slow pace of resettlement and unfinished environmental studies.[139] Another type of concern emerged in the context of the development of the Command Area Development Action Plan. It was drafted in 2003, years after it should have been completed, therefore again raising concerns about the *pari passu* condition.

3. The pari passu condition

Pari passu construction implies that all mitigating work that needs to be done with regard to the construction up to the next level has to be undertaken before construction of that phase is allowed. In other words, *pari passu* construction implies that the pace at which the dam is built cannot outpace rehabilitation work.

The introduction of the concept of *pari passu* in the mid-1980s was the result of debates between the water and environment ministries. While the latter thought that the project was not fit for environmental clearance, the former were keen to implement it. The *pari passu* condition was meant to allow construction work to proceed soon while not affecting the implementation of environmental mitigation measures.

Even assuming that the principle of *pari passu* was implemented in letter and spirit, it is unacceptable from an environmental policy and planning point of view.[140] The very idea of undertaking environmental impact assessments of a proposed project is undermined by the *pari passu* principle. Indeed, internationally agreed standards for environmental impact assessment provide that it is a proposed activity, which is assessed, not an activity that is already being implemented.[141]

Regardless of theoretical controversies over the principle of *pari passu*, in the initial years after the conditional environmental clearance was given, the content of the *pari passu* condition was rapidly eroded to the point where it was the pace of

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139 Patrick McCully (compiling), Sardar Sarovar Project (SSP), An Overview (Berkeley, CA: International Rivers Network, 1994).

140 *Cf.* Morse & Berger, above note 31 at xxi.

141 *See* Article 2(3), Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, 30 *International Legal Materials* 800 (1991).

construction that determined the pace of remedial work rather than the contrary.[142] Thus, in 1993, it was suggested, in an attempt to ensure the early closure of the sluice gates, that a 'temporary waiver' of the *pari passu* could be sought from the MoEF.[143]

The concept of *pari passu* was again given a prominent role in the context of the Supreme Court judgment in 2000 which provided that dam construction should go on as fast as possible but that this should be done in stages to ensure that remedial work was effectively completed before construction of the next stage. In other words, while the majority judgment sought the completion of the project at the earliest, the *pari passu* condition was the one compromise that was made in favour of the oustees and the environment.

This remains the main leverage that individuals and groups seeking effective remedial measures can use to try to ensure that the project authorities abide by the conditions that have been put forth. Ineffective implementation of the *pari passu* conditions posed in the 2000 judgment led to the filing of numerous complaints at the level of the Grievance Redressal Authority, as well as to the filing of new petitions in the Supreme Court. One instance of the complete failure to apply the principle of *pari passu* was noted by the Court in the context of Picchodi and Jalsindhi villages.[144] This concerned the fact that applicants were not only clearly project affected families (PAFs) but also happened to be PAFs at the height of 95 and 100 metres when the dam stood at 110 metres. It is this complete failure to implement the *pari passu* principle that the Supreme Court condemned in 2005.[145]

However, while the 2005 judgment seemed to uphold the notion of *pari passu* proposed five years earlier, the principle has been further watered down in the meantime. Events in 2006 seem to indicate that for all practical purposes *pari passu* now means that remedial work is to follow construction work as well as possible, but construction work is clearly given priority. This stands out, for instance, in the decision of the Resettlement and Rehabilitation Sub-group of March 2006 that grants clearance while specifically noting the findings of the GRA that rehabilitation work is expected to be completed by June 2006, or more or less when the dam was expected to reach 121.92 metres, in complete contravention of the terms of the NWDT Award.[146] The orders of the Supreme Court in the spring

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142 *See, e.g.*, Ramaswamy R. Iyer, 'Narmada: The Cost of Delaying Rehabilitation', *Hindu*, 1 May 2006, page 11. *See also,* Morse & Berger, above note 31 at 230.

143 NCA, Minutes of the 48th Meeting, New Delhi 31 December 1993, Item XLVIII-2 (252), pages 5-9, Closure of Construction Sluices at EL +18 m of SSP.

144 Judgment of 15 March 2005, § 21, reproduced below at page 277.

145 *Id.*

146 Narmada Control Authority, Resettlement and Rehabilitation Sub-group, Minutes of the 63rd Meeting, Item No. LXIII-2 (345), 8 March 2006, reproduced below at page 304.

of 2006 where construction was not stopped despite the evidence presented, for instance, by the Group of Ministers that resettlement and rehabilitation at 121.92 metres was not complete confirm this stand.

E. Sardar Sarovar and Beyond

The Sardar Sarovar Project is not only a project of superlatives, it is also a project that will leave its imprint in development debates, whether expected benefits are eventually delivered or not. Firstly, debates around the SSP have made an important contribution to rethinking the development contribution that can be expected from dams. Dams have always been premised on their contribution to economic development, whether in the form of irrigation water or power benefits. Given the focus on the economic development contribution of dams, any remedial measure required by the construction of a dam such as resettlement and rehabilitation of oustees and environmental remedial measures used to be seen largely as costs. The fact that oustees and their resettlement was seen as a 'cost' in the search for greater economic benefits explains why it has been difficult to move towards a position where displacement is seen not as a cost but as an important human right problem. From this perspective, one major contribution of the debates around the SSP and other dams has been to ensure that it is today very difficult to consider oustees only as 'costs' to be tabulated in the search for greater economic good. Thus, the whole 2000 judgment is, on the surface at least, concerned with the plight of oustees.[147] Further, in another judgment concerning another big dam, the Tehri dam in Uttarakhand, the judges specifically indicated that the overall project benefits from the dam cannot be used as an excuse to deprive oustees from their fundamental rights. Rehabilitation is a corollary of the rights recognised at Article 21 (right to life) of the Constitution and includes not only the provision of food, clothes and shelter but also support to rebuild lives.[148] This changed paradigm neither means that oustees' rights are always enforced, as witnessed in the case of the SSP, nor that the state is ready to recognise their rights without struggle. Recent developments in the case of the SSP tend to show that the 'cost' mentality still seems to predominate and the state is ready to shirk its responsibilities to oustees to ensure successful implementation of the physical works.

Secondly, the debate over big dams remains largely mired in a dichotomy that conceives big dams as modern and therefore in principle superior to other solutions that could bring similar benefits in terms of economic development. As a result, while the SSP controversy at the national and international levels led to what can historically be seen as a policy breather in the mid-1990s, this period is now over.

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147 Majority judgment, above note 49 at § 80.

148 *N.D. Jayal v. Union of India*, Judgment of 1 September 2003, 2003(7) *SCALE* 54 at § 60.

At the international level, the lessons learnt from the SSP in terms of resettlement and rehabilitation or environmental remedial measures have hopefully been learnt and not forgotten. In any case, what is apparent is that in the long run, the SSP crisis will only have been a temporary crisis of confidence in big dams. In the twenty-first century, the threat of global warming that has become one of the most politically sensitive environmental problems – while not the most severe environmental issue for most developing countries at present – has provided a new rationale for dam building since dams provide greenhouse gas-free power. Big dams are thus being proposed as modern solutions to a question of economic development (power generation) and an environmental problem (climate change). In other words, the big dams of tomorrow will be premised on being not only good for development but also good for the environment. This obviously obfuscates the fact that the negative environmental side effects of dams will be no less important whether they can be justified as carbon-neutral energy-producing projects or not.

Thirdly, big dams have been projected as symbols of development for decades. The symbolism can be used for various purposes. As noted in the case of the SSP, big dams are first premised on their potential for fostering irrigation and therefore contributing to the food security of the country. Over time and in view of the increasing problems faced by people in getting access to water for domestic use, the latter has also been added as a basic justification for dam building. Further, big dams are seen as potent signs of the overall economic development of a country. In other words, dams can also be used politically as rallying points for strengthening the idea of nationhood, as indicated in the case of the SSP where one of the justifications put forward from the time of the Khosla report was the introduction of irrigation in zones bordering Pakistan to ensure a permanent population presence in those areas.

Fourthly, the SSP represents one specific type of development endeavour, which is overwhelmingly driven by the state. This is visible not only in the fact that the state has initiated and implemented the project but also in the heavy use of the state apparatus. Thus, a whole administrative machinery was set up from 1979 onwards to plan, oversee and implement the project, starting with the Narmada Control Authority (NCA) established to provide the overall coordination and direction of the implementation of the SSP.[149] The NCA is supplemented by a number of other bodies, including the important sub-groups on environment and resettlement and rehabilitation. Further, a review committee composed of union ministers and the chief ministers of the relevant states was also set up with the power to review any decision of the NCA. While this review committee is meant to take decisions that are final and binding on all states, the situation since the 2000 judgment is that the

149 Constitution of the Narmada Control Authority, reproduced below at page 82 at § 9.

final authority on the SSP is in fact the Prime Minister rather than the review committee.[150]

1. Legal aspects

Legal issues have played an important role in the evolution and implementation of the SSP. This is due in part to the specific conditions under which the project was taken up. The fact that MP and Maharashtra saw their land submerged while the water benefits of the SSP went to Gujarat implied from the start that such an inter-state project might be mired in disagreements among the concerned states. Further, the planning of the project without participation or information to the oustees provided the basis for future conflicts over their rights. Several points can be noted.

Firstly, over the course of the nearly 60 years that have elapsed since a proposal for a dam was first mooted, the law that regulates remedial measures concerning dam and canal building has dramatically evolved. This is true at the national and international levels. From the point of view of environmental remedial measures, a clear and rapid evolution can be seen insofar as most of what is today's national and international environmental law has evolved over the project lifetime. As a result, there are a host of norms, which did not exist at certain earlier points in the project planning and implementation that have become central parts of environmental law. As noted above, in the case of environmental impact assessment, the norms that have been adopted imply that a project like the SSP should be subjected to further assessment, even if the procedure followed at the outset had been uncontroversially comprehensive.

From the point of view of resettlement and rehabilitation, the situation is much more complex. In principle, the main legislative framework is the Land Acquisition Act, 1894. This is supplemented in the case of the SSP by the NWDT Award, which provides a resettlement and rehabilitation package that goes beyond the colonial act. While the NWDT Award has been repeatedly deemed to be unchangeable, it needs to be read alongside the string of Supreme Court judgments and orders that have eventually come to condone the weakening of resettlement and rehabilitation provisions. This is, for instance, visible in the implied acceptance of the special rehabilitation package.[151]

Besides legal provisions that are binding in the case of the SSP, efforts to adopt a national rehabilitation policy are also noteworthy. While such a policy would have no direct implication for the SSP, it would likely influence the implementation of the conditions posed in the NWDT Award. After nearly two decades of debates, a

150 Majority judgment, above note 49 at § 280.

151 On the special rehabilitation package, see above at page 22.

policy was eventually put forward in 2004.[152] This policy has been widely criticised for not going far enough in strengthening the protection offered to oustees. As a result, a more progressive rehabilitation policy was drafted by the National Advisory Council (NAC) in 2005.[153] Yet, a new draft policy suggested by the Government in 2006 seems to again backtrack on the NAC proposal.[154] The overall result as far as the SSP is concerned is that beyond the terms of the NWDT Award, there does not seem to be a strong consensus yet to strengthen the rights of oustees in development projects. This may in part explain, but not justify, the relative ease with which the terms of NWDT Award are being weakened.

Secondly, courts and tribunals have played a central role in the overall debate concerning the SSP. The inter-state nature of the SSP paved the way for the setting up of the NWDT under the Inter-State River Water Disputes Act, 1956. The NWDT Award has played a central role in the shaping of the project. Further, various organisations and movements have used the courts in an attempt to achieve goals that could not be reached through political means. In particular, since 1994 the NBA has used the courts on repeated occasions to try and obtain what could not be obtained directly from the government. As noted above, apart from the petition of 1994 leading to the main SSP judgment of 2000, the NBA has repeatedly gone back to courts to try and ensure fairer outcomes for oustees. This includes various strategies from seeking a review of the 2000 judgment to trying to ensure compliance with the conditions posed therein.[155] The NBA has by no means been the only organisation or movement seeking to use the courts to achieve its aims. Thus, in Gujarat, the courts have been approached on various occasions. In some cases, courts did attempt to provide relief to oustees as in the case of the High Court Order of 25 February 1994 that enjoined the authorities not to take any further action towards the closure of the sluice gates.[156] More recently, the High Court was approached concerning the allocation of water for the Kachchh

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152 National Policy on Resettlement and Rehabilitation for Project Affected Families, *Gazette of India*, Extraordinary Part-I, Section 1, No- 46, 17th February 2004.

153 Draft National Development, Displacement and Rehabilitation Policy, May 2005, available at http://nac.nic.in/concept%20papers/rehabilitationmay2005.pdf. The National Advisory Council was set up by the government in 2004 to oversee the implementation of its National Common Minimum Programme, a set of governance principles adopted by coalition partners. *See* Order constituting a National Advisory Council, Government of India, Cabinet Secretariat, 31 May 2004, No, 631/2/1/2004-Cab.

154 *See* Comparative Statement of National Policy for Resettlement and Rehabilitation of Project Affected Families (NPRR−2003) and National Rehabilitation Policy (NRP-2006), available at http://www.dolr.nic.in/NRP2006-draft.pdf.

155 *See, e.g.*, Review Petition and Review Order, reproduced below respectively at page 244 and page 262.

156 *Lok Adhikar Sangh v. State of Gujarat*, Civil Application 522 of 1994 in Special Civil Application No. 4285 of 1991, Order of 25 February 1994.

district.[157] Further, courts have also been used by groups that seek to ensure the speedy completion of the project. Thus, as noted above the Narmada Abhiyan challenged the setting up of the Five Member Group in an attempt to weaken it.[158] Courts have also been a forum used to try and stifle dissent. To date, the most debated case has involved Ms Arundhati Roy who was accused of having 'led a huge crowd and held a dharna in front of this court and shouted abusive slogans against the court including slogans ascribing lack of integrity and dishonesty to this institution' in the context of the aftermath of the 2000 Supreme Court judgment.[159] The 2002 judgment in these contempt proceedings found that Arundhati Roy had 'committed the criminal contempt of this court by scandalising its authority with malafide intentions'. It went on to find that:

> [a]s the respondent has not shown any repentance or regret or remorse, no lenient view should be taken in the matter. However, showing the magnanimity of law by keeping in mind that the respondent is a woman, and hoping that better sense and wisdom shall dawn upon the respondent in the future to serve the cause of art and literature by her creative skill and imagination, we feel that the ends of justice would be met if she is sentenced to symbolic imprisonment besides paying a fine of Rs. 2,000.[160]

The judgment was widely condemned, not only because it sought to stifle dissent in the specific case of the SSP but also because the law of contempt is not uniformly applied and because the notion that citizens cannot criticise judges in itself is extremely outdated.[161] This is not the only case where attempts have been made to use the courts to stifle dissent. On at least two occasions, the latter in mid-2006, the NBA was faced with allegations concerning the alleged foreign source of its funding and the seditious nature of its activities.[162] While such allegations led to an apology in 1990 and will probably fizzle away as well in the latest case, they conform to the pattern of Strategic Litigation Against Public Participation (SLAPP) which have also been used in other cases, for instance, in the context of the Maheshwar dam, another big dam on the Narmada river.[163]

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157 *Kachchh Jal Sankat Nivaran Samiti v. State of Gujarat*, reproduced below at page 105.

158 *See* above at page 10.

159 Re: Arundhati Roy (Contemner), Judgment of 6 March 2002, Contempt Petition (Crl.) 10 of 2001, available at www.ielrc.org/content/c0201.pdf.

160 *Id.* at 14.

161 *See, e.g.*, Rajeev Dhavan, 'Arundhati Roy's Contempt', *The Hindu* 5 April 2002.

162 The National Council for Civil Liberties is the same organisation that was attacking the NBA on the same grounds after the 2000 Supreme Court judgment. *See* Ashish Kothari, 'Against a People's Movement', 18/15 *Frontline* 3 August 2001.

163 *See, e.g.*, *Shree Maheshwar Hydel Power Corporation Ltd v. Chittaroopa Palit*, Bombay City Civil Court, Order of 23 October 2001. *See also* Rajeev Dhavan, 'Corporates versus the People', *The Hindu* 16 May 2003.

Thirdly, the role that courts have played in the context of the SSP is of broader relevance for the development of public interest litigation. The reason why courts were approached by the NBA was linked to the perception that the Supreme Court was likely to respond favourably to their claims. This reasoning seemed appropriate in the initial years. However, in the 2000 judgment, the court made strong strictures against the NBA, which have broader implications for public interest litigation. In the course of the discussion of the NBA's petition, the judges repeatedly stressed that the NBA should have approached the Court much earlier since it was in effect challenging a clearance obtained seven years earlier. Thus, after the 2000 judgment:

> [w]hen such projects are undertaken and hundreds of crores of public money is spent, individual or organisations in the garb of PIL cannot be permitted to challenge the policy decision taken after a lapse of time. It is against the national interest and contrary to the established principles of law that decisions to undertake developmental projects are permitted to be challenged after a number of years during which period public money has been spent in the execution of the project.[164]

In the specific SSP case, the principle of laches was used by judges to justify their refusal to look into issues raised in the petition relating to the height of the dam and the extent of submergence, environment studies and clearance, hydrology, seismicity and other issues.[165] As a result, the judges asserted that they could only look into the issue of resettlement and rehabilitation. Interestingly, the judges still decided to address other issues even though they determined that it is 'not necessary to do so'.[166]

The same type of argument was subsequently used in another dam-related case. In the 2003 Tehri dam judgment, the judges again determined that they could not entertain a petition asking them to think about the decision to construct the project when implementation was nearly complete.[167] The issue of laches raises broader questions. While courts have not hesitated to take a strong stance in projects or issues of relatively minor importance, they have shied away from taking the same type of decisions in major projects. Laches thus becomes an excuse used by courts not to address certain issues in the case of major development projects. The NBA was told in clear terms that its pleas would not be entertained because it had come to the Court too late for the Court to review the project itself. The Court thus emphasised the finality and binding nature of the NWDT Award.[168] Yet, as mentioned above, with regard to the introduction of the special rehabilitation

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164 Majority judgment, above note 49 at § 78.

165 On laches, *see* majority judgment, above note 49 at § 76ff.

166 Majority judgment, above note 49 at § 80.

167 *N.D. Jayal v. Union of India*, Judgment of 1 September 2003, 2003(7) *SCALE* 54 at § 12.

168 Majority judgment, above note 49 at § 204.

package, which goes against the terms of the Award, the same Court does not seem to think that this is cause for major concern. Further, while some level of certainty is indeed required in planning small and large projects, the amount of money spent on an ongoing project or the length of time that has elapsed since the initiation of a project can never be used as an excuse for not reviewing it. What matters at the end of the day is not whether the dam is built but whether all the conditions posed have been fulfilled. In practice, arguing that the amount of money already spent on the project precludes further debate implies that the fate of oustees is made subsidiary to the completion of the construction work. This is not acceptable from either a human rights or an environmental perspective. This has been a recurrent issue since the Department of Environment and Forests already argued in the mid-1980s that the amount of money invested until then on the SSP should not preclude project planners from modifying some parameters to minimise environmental damage while at the same time ensuring optimal utilisation of water resources.[169] In fact, leniency towards organisations or individuals seeking to ensure compliance with environmental or human rights conditions should be granted in a case like the SSP where even in 1992 it was acknowledged by a government official that benefits to the water-scarce areas of Gujarat may only be felt by 2025.[170]

Fourthly, international law has played a subsidiary but noteworthy role in SSP debates. The World Bank loans brought to the SSP the whole set of policies that provide the framework for the implementation of bank-funded projects. These internal documents are of great relevance because they are binding for all projects and because they generally closely follow existing international norms in their respective fields. In the case of the SSP, they constituted the basis for the assessment of the independent review chaired by Bradford Morse.

International treaties signed by India have also been important signposts in the overall law-related discussions. This has in particular been the case of Convention 107 of the ILO. Convention 107 is a relatively old treaty of 1957, which seeks to protect the rights of tribal people and in particular provides land for land compensation.[171] It has been superseded by Convention 169 of 1989, which updates Convention 107 to strengthen the rights of tribal people.[172] India has only ratified the older convention. Nevertheless, compliance with the relatively non-

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169 Department of Environment & Forests, above note 94 at conclusion § 5.

170 D'Souza, above note 7 at xiii.

171 Article 12, Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 26 June 1957, partly reproduced at page 443.

172 Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, 27 June 1989, 28 *International Legal Materials* 1382 (1989).

demanding commitments under Convention 107 has proved difficult as visible in the references made concerning the SSP at the ILO.[173]

2. Sardar Sarovar legacy

As of early 2007, it appears likely that the Sardar Sarovar Dam will be completed. In other words, the main component of the SSP is likely to be implemented as planned. This constitutes a major achievement from an engineering point of view. Nevertheless, in the twenty-first century, the successful conclusion of the physical works is not sufficient to declare the project a success. Indeed, the fact that from the outset measures were put in place to ensure resettlement and rehabilitation of oustees and remedial measures for negative environmental impacts implies that a comprehensive assessment of the project must take these dimensions into account. From this point of view, it is unlikely that the SSP will be remembered as a successful project. Whereas the conditions expressed in the NWDT Award of 1979 cannot be said to be extremely onerous, these conditions have not been fulfilled and may, or may not, be fulfilled in the future. The most severe failure concerns the situation of oustees that are affected by non-compliance with the terms of the Award with reference to the timeline for resettlement, by changes in the terms of the Award when they are offered the 'special rehabilitation package' and by resettlement and rehabilitation in sites which do not provide them even with the same basic amenities they had in their original villages.

The completion of the dam is one important part of the SSP. However, a comprehensive assessment of the project needs to also examine other elements such as the gigantic canal network and the massive drinking water project. It is only when these infrastructure projects are completed that it will be possible to say whether the SSP has fully delivered on its promises. Indeed, it is irrigation for water-scarce areas of Gujarat and some parts of Rajasthan as well as more recently drinking water for a large part of Gujarat which provide the underlying justification for the SSP. Knowing that water is flowing through the main canal in the already relatively well-watered areas of Southern and Central Gujarat is a positive outcome but is insufficient from the point of view of the overall rationale given to justify such a huge project.

While the fate of oustees and the actual benefits delivered by the SSP should be the primary concern of all actors involved, it is also necessary to look beyond the project itself to examine its broader impacts. From the perspective of resettlement and rehabilitation, the outcome of the SSP is likely to be both significant and minuscule. The inter-state nature of the project led – without the participation of

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173 *See, e.g.*, the two documents reproduced below concerning SSP in the context of Convention 107 at page 444. A number of other references to SSP have been made to the Committee of Experts.

the oustees in the NWDT – to a decision, which was more progressive than the conditions prevailing at that point under the Land Acquisition Act, 1894. This is not to say that an ideal resettlement and rehabilitation law should adopt the parameters of the NWDT Award given its limitations in terms of the restricted definition of 'oustee' and the limitation of its application to dam-displaced people as opposed to SSP-wide displaced people including oustees from the canal network. Further, the NWDT Award is fundamentally vitiated because there was neither information nor participation of affected people in the planning or implementation of the project. Nevertheless, the NWDT Award provided at least the basis for land for land compensation, which was a step forward. While this was to be welcomed, it is uncertain what is left of these progressive features today. On the one hand, as noted above, within the SSP the principle of land for land compensation has for all practical purposes been abandoned since the special rehabilitation package authorises cash compensation instead. On the other hand, while efforts to develop a national policy on resettlement and rehabilitation were undertaken from the mid-1980s, the document eventually adopted in 2004 in effect does no more than promising to attempt to provide land for land where possible.[174] Even if a stronger policy modelled after the NAC proposal was adopted as official national policy, this would still fall short of being binding on the government. A resettlement and rehabilitation act, which supersedes the Land Acquisition Act, is what is required to ensure that oustees' rights effectively become rights rather than privileges granted by the state.[175]

The visibility of the SSP for the past two decades has largely been due to the presence of the NBA and other movements, organisations and individuals that have ensured, though not without much difficulty, that the SSP has remained a politically live issue. While the SSP is by far not the only project where civil society has played a big role in trying to ensure that projects are not implemented without full implementation of remedial measures, it is a special case because of the visibility that the NBA managed to give to the project at the national and international levels. The success of the NBA in making the SSP a national as well as an international issue have been key elements in the way the SSP has been implemented over the past couple of decades. The NBA has ensured through its work that generations of people in India and abroad who would not have known about the impacts of big dams earlier are today aware of the type of problems that arise. Overall, it is remarkably difficult to judge the actual impacts of the NBA and associated organisations on the SSP and big dam policy. The NBA was more than instrumental in forcing the World Bank to call for what became the Morse Report, which in turn led to the bank's withdrawal, the setting up of the Inspection Panel

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174 National Policy on Resettlement and Rehabilitation, above note 152.

175 One proposal going in that direction is the Bill introduced by Rajya Sabha MP, E.M. Sudarsana Natchiappan, The Multi Purpose Inter-State River Projects and Setting up of Large Enterprises (Rehabilitation of Oustees) Bill, 2006.

and was instrumental in the setting up of the WCD. The NBA was also successful in forcing the government to respond to its claims, for instance, by setting up the FMG, managed to obtain a four-year pause in the dam construction when it first approached the Supreme Court and was instrumental in ensuring the setting up of a GRA in each of the three states.

However, from a longer term perspective, the NBA's achievements seem to be partly dwarfed by the fact that the dam is inexorably being built and resettlement and rehabilitation is not being achieved as per the terms of the NWDT Award. Overall, the use of existing legal mechanisms to ensure the realisation of oustees' rights has brought some relief to the oustees but not full success. When the analysis is taken one step further, it becomes apparent that the use of courts to achieve justice has been a double-edged sword in the case of the SSP. While even in the 1990s the idea of approaching the Supreme Court was not an obvious choice, it was eventually done because it seemed, on the basis of the existing case law, that relief could be obtained. The partly unforeseeable problem is that over the past 12 years, public interest litigation has suffered a series of setbacks and the wave of optimism which led people to expect courts to provide full justice in all environmental and human rights cases in the early 1990s has proved misplaced. This general trend has been more marked in the case of big development projects where courts have been much less keen to challenge the government than on smaller issues.

Among the Narmada dams built or planned, the SSP is the one that has received most attention and been subjected to most scrutiny. However, this does not imply that other projects are proceeding without controversies. In fact, significant problems with regard to resettlement and rehabilitation have been highlighted in various cases ranging from the relatively older Bargi dam to recent issues in the case of the ISP.[176] In the case of the Maheshwar dam, an additional controversy occurred because it was the first big dam project to be handed over to the private sector.[177] Apart from the Bargi dam, which was substantially completed before the NBA started large-scale work on Narmada dams, other big dams in the valley have also been the focus of close attention by the NBA. In fact, for the past many years, some NBA activists have devoted themselves entirely to issues and concerns related to dams upstream from Sardar Sarovar, such as Maheshwar, Omkareshwar

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176 On the Bargi dam, *see, e.g.*, The Human Cost of the Bargi Dam (Jabalpur: Bargi Bandh Visthapit Avam Prabhavit Sangh, 1998). On the Indira Sagar Pariyojana, *see, e.g.*, Arundhati Roy, 'The Road To Harsud', *Outlook* 26 July 2004.

177 On the Maheshwar dam, *see, e.g.*, Richard E. Bissell, Shekhar Singh & Hermann Warth, Report of an Independent Review – Maheshwar Hydroelectric Project: Resettlement and Rehabilitation (Report conducted for the Ministry of Economic Cooperation and Development (BMZ), Government of Germany, 2000).

and ISP.[178] As a result, the success or failure of the SSP from the point of view of project construction or from the point of view of remedial measures cannot be analysed in isolation from what has happened and is happening in the case of other dams. The SSP offers many lessons and some hope for people affected by other big dams on the Narmada or elsewhere.

178 In terms of recent litigation outcomes, *see, e.g.*, concerning ISP, *Narmada Bachao Andolan v. Narmada Hydro-Electric Development Corporation*, High Court of Madhya Pradesh at Jabalpur, Writ petition No. 3022/2005, Order of 8 September 2006, available at http://www.ielrc.org/content/c0613.pdf.