

# Southern Transport Development Project CRP Request

## Inspection New Evidence

### Previous ADB Inspection actions with regard to this request

Gama Surakeema Sanvidhaniya (GSS) requested an Inspection in 2001. The Board Inspection Committee (BIC) recognised it was not frivolous and met the requirements for an inspection.

Copies of the requests and covering letter were attached to the SPF Complaint [Appendix 3\(a\)](#) and [3 \(b\)](#). NB All references to Appendices are to the SPF Complaint.

In line with the 1995 Inspection Policy the Board Inspection Committee (BIC) asked for a response to the request from Management. After considerable delay permitted by BIC without any consideration of the requesters' position, they received a response. The response was legalistic and contained many factual errors. Without seeking any input from the Requesters the BIC decided on the basis of the Management Response to reject the Inspection Request.

As required by the Inspection Policy the rejection had to be reviewed by a member of the Inspection Roster. **He produced a report stating that he disagreed with BIC and recommended that an Inspection be carried out.**

However the ADB Board accepted the recommendation of the BIC to reject the Inspection Request, disregarding the Roster Member's conclusion. The report containing all the details on this request was issued by BIC in March 2002.

The original inspection request raised a number of other ADB policy violations in STDP, in addition to the issue of the EIA and the alteration of the traces. The ADB should have inspected those violations but did not.

Another organisation, Unified Society for the Protection of Akmeemana (USPA) requested an Inspection in 2001, copies were attached to the SPF Complaint [Appendix 4\(a\)](#) and [4\(b\)](#). This request followed a similar pattern with Management maintaining the same errors in their Management Response. BIC decided against the Inspection and again the Roster Member recommended an Inspection should be done. The details of this request are in the report of the Board Inspection Committee dated April 2002.

Various other societies and individuals requested an Inspection during this same time. The Board Inspection Committee directly rejected these and no detailed reports were issued on these.

The failure of the inspection process to solve the problems of those affected by the project was one of the main reasons that ADB was forced to fully and properly review the Inspection process.

At the Annual General Meeting of ADB in Shanghai in 2002 a representative of GSS advised the President of ADB and the Senior Management of the many errors in the Management Response to GSS. The details of the errors were handed in summary

form to them (SPF [Appendix 3 \(c\)](#)). The USPA report was not yet available so that was not discussed.

ADB Management responded to the GSS list of errors on 26<sup>th</sup> July 2002 with a further set of inaccurate statements SPF [Appendix 3\(d\)](#). GSS replied to this demonstrating the inaccuracies of Management in their report using the various documents of ADB SPF [Appendix 3\(e\)](#). The President of ADB and ADB Management refused to consider this document.

A list of the errors in the USPA Management Response were attached to the SPF Complaint [Appendix 4\(c\)](#).

Since the rejection by BIC the Requesters have been taking actions through the Courts in Sri Lanka.

### ***New Evidence***

We are submitting the following “new evidence” so as to comply with the Accountability Function’s requirement that claims disposed of once cannot be brought before the new mechanism unless there is “new evidence”. We consider the following to be New Evidence and to be more than sufficient for an unbiased recommendation for a full inquiry and the project disbursements to be suspended. As the USPA and GSS inspection rulings were similar and the Court Actions produced a single Judgement we combine the New Evidence below.

#### **Judicial Committee (SPF [Appendix 8](#))**

Members of GSS and USPA filed action in the Court of Appeal against the RDA and CEA. The Bench of Judges could see there was a large volume of evidence which required considerable time to hear, and that site visits would most likely be necessary. Therefore they set up a Judicial Committee with the agreement of all parties. The Court appointed three retired Supreme Court Judges with the eminent Chief Justice Parinda Ranasinghe to chair the Committee. Costs of the Committee were equally shared by State and petitioners. The villagers of Akmeemana and Bandaragama had to fund Rs.100,000/= between them.

The Committee had many days of hearings with all the parties present and represented by Counsel. They heard from many of the 50 petitioners and also their neighbours. Experts spoke on behalf of the RDA and CEA. The Committee spent two days accompanied by Counsel, the RDA, CEA, their experts and some of the petitioners visiting the sites under the guidance of first the RDA and then the Petitioners. All parties were given full opportunity to present their information except the evidence of one of the main wetland experts in Sri Lanka whose presence was rejected by the CEA.

The ADB had imposed a deadline for submission of the Resettlement Implementation Plan (RIP) which constrained the Committee as the completion of their report had to precede the submission of the RIP. Members of GSS & USPA visited ADB Colombo Office and asked them to extend the deadline by a week or two to give the Committee time to do a full investigation. This request was turned down and the Committee had to rush their investigations. This is Further (and New) Evidence of ADB’s

unwillingness to co-operate in identifying and correcting the errors on this project and bringing it into compliance.

The Judicial Committee concluded that:

“The word “alteration” cannot and must not be construed to encompass only changes that are made voluntarily by a project proponent. Alterations made in pursuance of a direction made by one in authority too need subsequent examination and affirmation.”

“The alterations affected in this case are in fact changes of a substantial character, nature and extent. They need to be approved afresh.”

“...the deviations, both at Bandaragama and at Akmeemana, can only be considered feasible and desirable if the procedure set out in the NEA and regulation 17 relating to ‘alterations’ are complied with,....”

These decisions made by the Judicial Committee identify that the EIA process required for approval was necessary for the alterations.

This is New Evidence confirming that the FT is an “alteration” and that it lacks approval under the National Environmental Act.

### **Supreme Court Judgement (SPF Appendix 9)**

Affected persons from both the Northern and Southern Deviations filed action in Courts against the RDA, CEA and associated parties. The judgement was issued on 20<sup>th</sup> January 2004 and is New Evidence.

1. It is a Supreme Court Judgement on the Expressway that was delivered **after** the Inspection Request was denied.
2. It is a **new confirmation**, by the Highest Court in Sri Lanka, of the contention of the Requesters that the RDA was constructing on an unstudied trace, which fact was disputed by the ADB at the time of the Previous Request.

The Judgement, delivered by the Supreme Court, gave clear decisions on several points which are relevant to the Breaches of ADB guidelines and to statements by ADB Management in its Response.

The Supreme Court judgement stated: -

- (1) That the deviations (“alterations”) were not covered in the studies done for the EIA
- (2) That the petitioners in the case were affected by the Final Trace (FT), and **not** by the Original Trace (OT) nor Combined Trace (CT).
- (3) It found that the “final alignment” did **not** include “the petitioner’s area.”
- (4) That the RDA altered the route (to the Final Trace), after the CEA approved an earlier trace. The court held that **the deviations were “alterations” and as such the National Environmental Act required a Supplementary EIA to be done.**

- (5) That the CEA could not delegate its power to approve the deviation (“alteration”) to the RDA; thus only the CEA could approve the Final Trace. Which it had not.
- (6) That the people affected by the deviations were **entitled to prior notice and to be heard**
- (7) That the **Rights of the Petitioners under the Constitution of Sri Lanka had been violated.**
- (8) That the **Principles of Natural Justice had not been adhered to.**

**\*\*It should be noted that the Supreme Court has ruled that the deviations have not been legally approved. This is a breach of the ADB Policies.**

**\*\*The Court has ruled that the Affected Persons had not been given prior notice or been heard. This is also a breach of ADB Policies.**

**\*\*The Supreme Court ruled that the deviations (“alterations”) had not been studied in the EIA and required that a supplementary EIA be conducted. ADB Policies require that national environmental laws are adhered to and that projects with significant changes (as in this case), be re-appraised with new environmental and social documentation produced and approved as the case may be.**

### **1999 case on EIA - ADB Management misrepresented facts**

In 1999 the Public Interest Law Foundation (PILF) took a case to the Court of Appeal regarding the Southern Expressway. This was nothing to do with the CEA ruling on traces, nor was it brought by the requesters.

The Board Inspection Committee denying our inspection requests gave as one of the reasons “The RRP made clear that the final trace to be followed depended on a ruling by the CEA, which reverted the ‘combined trace’ to the ‘original trace’. The CEA was subsequently **challenged in court for this** but upheld by both the Court of Appeal[s] and the Supreme Court (as cited in the Management’s Response). This material development had not been disclosed by the Requester.” (Our emphasis)

This statement by the BIC is incorrect for the following reasons

1. The Court of Appeal and Supreme Court case did not challenge the traces, it challenged the inadequacy of the EIA in researching alternatives to an Expressway.
2. The requesters were not parties to this case and were not even aware of the details of this case when the Inspection Request was made.
3. The judgement in fact stated that the Combined Trace was the approved one.

**The requesters could not have known, indeed never expected, that the BIC would misunderstand the judgement especially as the legal premise and grounds had been clarified to ADB Counsel. Exposure of this must be New Evidence.**

Following the preparation of the Inspection Request, at the meeting of some of the Requesters and others with a Mission from ADB Manila on 10<sup>th</sup> December 2001, ADB Counsel mentioned the PILF case judgement. As the Requesters were not involved in the case they were not aware of the details of the judgement. Therefore

they asked the lawyer who brought the action to clarify the matter with the ADB Counsel. This was done. It is difficult to comprehend how the judgement, with clarification of the issues provided to the Counsel, was subsequently so misinterpreted by ADB.

1. ADB Management had a copy of the judgement, which is also annexed to the Management Response. (SPF Appendix 4). ADB Management could not have read into it any issue about the traces.
2. ADB Management acted in bad faith. The lawyer who brought the PILF action informed ADB Counsel Mr. Arjun Goswami and the secretary to the BIC by fax. Significant excerpt is...

“The EIA was challenged by PILF on the basis that it had failed and neglected to address “environmentally friendly alternatives” adequately. In particular several alternatives, including a hinterland roadway, the expansion of the coastline railway and combinations of these as well as the TSM option had not been considered. The court ruled that alternatives had been considered on the basis of what the ‘experts’ said in the EIA.”

3. ADB Management was aware from the judgement that the requesters were not parties, further the lawyer who brought the case had stated this in his fax to Mr. Goswami...

“The communities who have petitioned the ADB’s inspection procedure were not parties to that case and hence their rights and interests remain unaffected by that decision.”

4. The Judgement of the Court of Appeal in the PILF case confirmed the choice of the combined trace stating...

“Needless to say, under judicial review procedure, it is not open to me to substitute my own views for that of the CEA which has thought it fit to accept the recommendation of the experts.....Southern Expressway which is depicted as the ‘combined trace’. ... as the best of all options or schemes.”

***The Combined Trace was the approved one. The trace now being used in the areas relevant to this request does not follow even one metre of the Combined Trace.***

We as requesters were not aware that the ADB would misrepresent the facts of the 1999 case. **We urge the SPF to read pages 3, 4 & 5 of the ‘Management Denial Response’** (Attached as SPF [Appendix 3 \(e\)](#))

### **Supreme Court Judgement 2004 regarding PILF case.**

In the Requesters case in the Appeal Court the RDA counsel made preliminary objections that the case had already been adjudicated through the Judgement on the PILF case. However this was not accepted and the cases proceeded in the Court of Appeal and finally to the Supreme Court. The Appeal Court did not find the objections of the RDA regarding the PILF case to be justified. The Supreme Court

also did not accept the argument. Thereby confirming that the PILF challenge on alternatives was nothing to do with the issue of a trace that did not conform with the laws of Sri Lanka. The two issues were not related. Please note that the question of alternative modes of transport was not raised in the Inspection Requests.

**This is New Evidence, ADB Management stated that the PILF case had conclusively decided on the matter. The Board Inspection Committee believed them. The Supreme Court judgement shows that the Management response was incorrect. The Final Trace is a new trace, for which no EIA has been done.**

### **Location of the trace**

In our requests for inspection the location of the trace and the fact that we were not informed of the new trace were central to the request.

The ADB Management made out that the EIA covered a wide area, the Supreme Court also heard arguments from the RDA and CEA with regard to “Project Area” and did not accept them. This is conclusive, within Sri Lanka’s legal framework, the EIA did not cover a wide area.

### **Maps showing the actual position of the traces (SPF Appendix 5 & 6)**

The Management Response was very clear that the “Project was approved on the basis of a 3-4 km wide corridor”. In many places the Management Response to GSS stated that the Requester’s area was within this corridor. (Paragraphs 43, 57, 58, 63, 65, 66, 74, 77, 91, 95, 96, 97, 98 & 100.) The Requesters of the GSS Inspection were and are not within the corridor.

We have been advised that the only evidence the Bank Inspection Committee considers acceptable to prove this is an official map showing the distances between points. No official map was available to the Requesters (or the Public) at the time of the submission of the Inspection Request to show that the Final Trace was outside the Corridor.

Maps that the RDA had produced were only made available to the Courts during the cases. They were not available to the Affected Persons before hand and were only given to the Courts directly by the RDA. Copies of these maps are attached to the SPF Complaint as Appendix 5.

In fact there are other maps that were shown to Court which would have been further proof of the distances. The RDA promised in Court, to give them to the petitioners, but has not done so, despite written requests by the petitioners’ lawyers.

The maps attached show the individual traces and give the distances along the trace. From this it is clear that the supposed **3km band does not cover the Final Trace**. The Final Trace is outside the band that the feasibility study had agreed as the basis for the preparation of plans by the RDA and their consultants. The actual studied area was only 122 metres on the OT and 200 metres on the deviations recommended and included in the CT. The SIA only covered the trace itself.

For clarity a diagrammatic map of the Bandaragama deviation is attached showing the traces and the 3 km band. ([Map 4](#))

### **Obtaining of “Consent” and Intimidation by RDA (SPF Appendix 12 & 13)**

In August 2002 the RDA required to prove to ADB the consent of those who would be displaced. They also wanted to carry out surveying of the Final Trace. Because of the injustices they had suffered the affected people were not willing to give up their rights to their property so surveying was refused. The RDA then came with Police and the surveyors. The RDA Officers also used the presence of the Police to intimidate householders into signing questionnaires, which were later completed by RDA officials. Affidavits and Photographs are attached to the SPF Complaint.

The complicity of ADB, whilst not being provable is certainly indicated. Two of our leading members were attending an ADB consultation in Kathmandu on the Inspection Process. Whilst they were there, their Homes and Lands and those of their neighbours were invaded. The surveyors came with Police. According to them they were instructed by a phone call to go in that day. The ADB staff present in Kathmandu were advised of the actions of the RDA.

The above is New Evidence of the actions of RDA and the possible complicity of ADB. The lack of action by the ADB after this leads one to believe that they were silent but willing partners in this violation of basic Human Rights. The completion of forms by RDA Officers, the intimidation to obtain signatures, the willingness of ADB to use this information despite knowing how it was obtained, all of this is outside ADB policies. It occurred in August 2002.

### **ADB Manila Review Mission Site Visit (SPF Appendix 15c & 15d)**

On 22<sup>nd</sup> May 2004, the [Review Mission](#) consisting of Ms Mulquenny, Ms Jayewardene and Mr Tsuji visited the Bandaragama and Akmeemana areas. Mr Cooney and Mr Rinker from the Resident Office accompanied them. They were able to see the actual position of the Combined Trace, Original Trace and Final Trace. In Bandaragama by travelling the distance between the traces they were able to register the distance between the Combined Trace at Rammukkana and the Final Trace at Gelanigama, which was noted as 2.8km. The distance between the Original Trace at Weedagama and the Final Trace at Gelanigama was noted as 0.6 km. This is New Evidence of the actual distances between the traces as this exercise had not been done with anyone from ADB till then.

### **Social Impact Assessment**

The Social Impact Assessment only covered the CT, as is clear from the SIA itself. **The SIA says that the questionnaire only covered the sample of houses actually along the trace.** The details in the tables concerning demographics and homes referred only to those on the trace itself.

This information was enhanced by “discussions” with people on attitudes to the Expressway being close to their house. These discussions were held in a 3km band centred on the Combined Trace. These discussions did not form part of the data in the SIA and hence could not have formed the basis for the Resettlement Plan.

The SIA was not available to the Requesters until a formal application was made through counsel in the Appeal Court case. This was long after the Inspection Request had been denied. Therefore the Social Impact Analysis is New Evidence on the corridor used for the RRP and on which the approval of the loan was based.

### **Feasibility Study**

The feasibility study shows the reason for the CT being recommended as the only viable option in the EIA. The feasibility study was available only to RDA and ADB, not to the Requesters. One section was provided to the Requesters with the Board Inspection Committee report after the Inspection had been denied. The page attached to the SPF complaint as Appendix 11 is therefore New Evidence.

**It is pertinent to note here that the Feasibility Study is still not available to the requesters due to the refusal by the GoSL to release it. We think that the Feasibility Study will reveal much New Evidence.**

In order for the CRP to ensure they are adequately informed they would need to ensure that we are given a copy and are able to make our submissions on it.

### **Involuntary Resettlement (SPF Appendix 7) and Additional Evidence to the SPF**

Since the Inspection Request the RDA and the associated government officials and the contractors have removed people from their homes. The way this was done is outside the guidelines of the ADB.

No Resettlement plan is available to the public. The Joint Organisation has received (30<sup>th</sup> April) a copy from the Resident ADB Office thanks to our request made in Manila on 17<sup>th</sup> March. Copies are not available at the Divisional Secretaries Offices in Akmeemana or Bandaragama or at the RDA Resettlement Offices, despite written requests and many visits. The Sinhala copy of the plan is not available at all Divisional Secretariats notwithstanding assurances by ADB that it was available. (ADB wrote on 28<sup>th</sup> Sept. 2001 in response to GSS letter of 11<sup>th</sup> Aug.2001.) Chairman RDA promised a Sinhala copy would be available within a month in June 2004. This is still not available 5 months later.

An extract of 12 pages in Sinhala was made available to GSS recently but omits vital pages like the sequence of acquisition steps, details of entitlements, resettlement sites etc., The English document is over 2 inches thick.

Details of the way people have had their homes destroyed without any payment of compensation is noted in the information given to SPF. Widows, disabled, children, old people, many have been left without shelter, without proper access to water and without sanitation. The Government Officials have insisted on the home owners destroying their homes saying that if they did not they will never get anything. The powerless have little choice but to accept. This is very far away from all the policies of ADB.

It is contrary to the terms of the Loan Agreement that the ADB and the GoSL signed. The ADB is not ensuring that the Involuntary Resettlement Policy is followed. This would not have been known or even contemplated by any sane person at the time of the previous inspection request. This is New Evidence

### **Resettlement Monitoring**

The ADB employed a monitoring firm whose only action is putting more pressure on people to leave their homes. They have certainly not been acting as monitors.

The monitors went to individuals, took photographs of their homes, gave exaggerated values for their properties and then asked if the people would accept such a sum. The answer was yes. Subsequently the compensation offered by the RDA did not come anywhere close to the sum suggested by the monitors.

Request by us for the Monitoring Report was made in Manila on 17<sup>th</sup> March 2004 and again to Mr. John Cooney, Country Director, Sri Lanka on 28<sup>th</sup> April 2004 with no success. This is yet more new evidence of ADB's lack of Transparency.

SPF Report and Recommendations confirmed there was no proper monitoring being done.

A recent survey by the respected NGO, Centre for Environmental Justice shows that 73% of resettled families were not satisfied with the compensation they received. 95% had not received their total compensation even though they had been dispossessed. (Document "Dream Road that destroys sustainable livelihood" available with SPF).