

A clear case of the bureaucracy ignoring the Supreme Court's rulings in the *Eppawela* judgment?

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Island.

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The Asian Development Bank, in case you didn't know, has played God in our part of the world for a very long time. Strictly incognito, of course. And, like God, the ADB too works in mysterious ways. Take, for instance, that newspaper notice by the Director of the Department of Wildlife Conservation in the English press on May 19, 2002, calling for public comment ["...with a view to maximising the national benefit..."] on the "Report and Recommendation of the President..." (RRP) relating to the ADB's Protected Area Management & Wildlife Conservation Project. Well, what's so mysterious about that? You may well ask, and I'm about to tell you. The Project was *already 9 months into implementation* when public comment was called for last month - that's what's mysterious about it. Don't quote me, but I have also heard it said that the timing and wording of the press notice was a terrible mistake; the notice was apparently meant for publication, no, not in May 2001, or even May 2002, but in May 2007, just one month before the Project ends. One of the chastening 'lessons' the ADB has learned, I hear, is that the views of the people its projects are intended to help should be sought *after* the exercise ends, *never before*. Very sensible strategy.

But instead of waiting till May 2007, I responded to the Director's request for comments and received an acknowledgment and a promise to revert.

What follows is culled from my responses to the Director's request for 'inputs', the focus here being largely on the *Eppawela* judgment's relevance to the ADB Project. For the record, the unanimous landmark judgment in S.C. Application No. 884/99 [F.R.] was delivered on June 2, 2000, by a three judge Bench of the Supreme Court comprising Amerasinghe, J. (Chairman), Wadugodapitiya, J. and Gunasekera, J.

The ADB's RRP on the subject of *Environmental and Social Measures* (Page 26) states: "The Project is classified as environment category B. An initial environmental assessment (IEE) undertaken during project preparation concluded that the Project would be overwhelmingly beneficial from both an environmental and a social perspective.... Few potentially adverse environmental impacts were identified. Most are localised and of minor significance, for which mitigation measures are readily available. No project components are expected to result in major adverse environmental impacts..."

The ADB internet website for Sri Lanka, however, under *Environment Impact and Mitigation* states as follows: An initial environmental examination (IEE) was undertaken during Project preparation and a summary IEE has been prepared. *The IEE shows that no significant adverse environmental impacts from the Project are anticipated, and therefore, a detailed environmental impact assessment is not required.* Expected insignificant adverse impacts will be limited only to the construction phase, and localised impacts from construction of eco-tourism infrastructures, enrichment of wildlife habitat, particularly tank improvements, construction of trekking paths inside the national parks, and electric fences..." (emphasis added)

The questions that need to be asked, and answered are:

* When, and by whom, was the IEE undertaken?

* Why only a "summary" and not the "full" report indicating precisely which aspects of the Project were "initially examined" and which were not?

* Why was the consequent 'summary' never made public, not even on the ADB internet website?

* Is it that the ADB's much-publicised commitment to transparency in its project-preparation process does not extend to this 'IEE summary'?

* Do the people of Sri Lanka have to accept at face value and without question the "overwhelmingly beneficial" conclusion in Paragraph 80 of the RRP, and that "no major adverse environmental impacts" were either "expected" or "anticipated" as stated on the internet website - both sets of claims made by none other than the project proponent, a party clearly biased in favour of the project?

* Is not public awareness of the truth of the IEE findings all the more important since the ADB, solely on the basis of this IEE, has also unilaterally taken upon itself to decide (in the best interests of the people of Sri Lanka, no doubt) that "a detailed Environmental Impact Assessment (EIA) is NOT required"?

This last-mentioned decision by the ADB is, I venture to suggest, a serious illegality, one of commission, not omission. Based on what is not said in the RRP but is said on the ADB internet website, there can be no dispute that had the IEE revealed potentially significant adverse environmental impacts, a detailed environmental impact assessment (EIA) would then have become a mandatory requirement. But the decision whether the IEE, which the ADB claims was done, was done properly, whether it had revealed/identified any potential threats, whether those threats were significant or not, and whether the project proposal needed to be suitably revised or amended to take account of the findings of the IEE is, by law, the task of the Central Environmental Authority and no other. The ADB has simply assumed an authority it does not possess.

As for the ADB's strange concept of 'transparency' in not divulging the details of the IEE, one can only

remind that organisation that the Supreme Court in the *Eppawela* judgment went on to reiterate what it had said in *Gunaratne v. Homagama Pradeshiya Sabha*, (1998)

"... namely, that... publicity, transparency and fairness are essential if the goal of sustainable development is to be achieved" and added.

"Access to information on environmental issues is of paramount importance. The provision of public access to environmental information has, for instance, been a declared aim of the European Commission's Environmental policy for a number

shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."

The *Eppawela* judgment included several salutary reminders as well as guidelines to the bureaucracy, especially those in statutory bodies charged with environmental protection, of what needs to be done - and when - to keep the national interest uppermost in all decision-making. (The project proponents in the *Eppawela* project had not carried out an EIA prior to project implementation [substituting a 'feasibility report' instead], and promised to do the required EIA "in due course".)

Said the Judgment:

"In terms of the National Environmental (Procedure for approval of projects) Regulations No. 1 of 1993 (Government Gazette Extraordinary of the 24th of June 1993), hereinafter referred to as the 'NEA regulations', when the project proponent had the goal of undertaking the mining project at Eppawela and was actively preparing to make a decision in achieving that goal (see the definition of 'project' in the NEA regulations), such proponent should have made an application to the Central Environmental Authority (CEA) for approval of the project as early as possible. The project proponent might then have been required to submit to the CEA preliminary information about the project, including a description of the nature, scope and location of the proposed project accompanied by location maps and other details. (see the definition of 'preliminary information' in the NEA regulations). Such preliminary information would then have been subjected to 'environmental scoping', that is, among other things determining the range and scope of proposed actions, alternatives and impacts to be discussed in an Initial Environmental Examination Report or Environmental Impact Assessment. (See the definition of 'environmental scoping' in the NEA regulations). A matter of significance is that in the process of 'scoping' a project approving authority, such as the Central Environmental Authority, is

by law empowered to 'take into consideration the views of state agencies and the public'. (NEA regulation 6 (ii)) Having regard to the concerns expressed from time to time, the Central Environmental Authority might have exposed themselves to a charge of being remiss in the duties of a project approving agency had they failed to invite and consider the views of the public. The purpose of all this was to set the Terms of Reference (ToR) either for an initial environmental examination report or an environmental impact assessment (EIA)....

"The Central Environmental Authority was the 4th respondent in this case and was represented by learned counsel. However, no affidavits were filed by the 4th respondent nor were any oral or written submissions made on behalf of the 4th respondent. The Central Environmental Authority, the fourth respondent, should nevertheless in carrying out its duties imposed under the Order made in this judgment, have due regard to and give effect to the law, including the principles laid down or acknowledged by the Supreme Court in the matter before this Court.

"It was assumed by all the other respondents and the petitioners that what would be required by the 4th respondent for the purpose of considering whether the proposed project should be approved or not was an Environmental Impact Assessment; and that if an application had been made to the Central Environmental Authority for approval of the project, that Authority would, in all probability, after the process of 'scoping' referred to above, which might, as we have seen, included taking account of the views of state agencies and the public, have called for an Environmental Impact Assessment from the project proponent on the basis of the Terms of Reference determined by the Central Environmental Authority.

"Attention is drawn, particularly that of the Central Environmental Authority, to Principle 17 of the Rio De Janeiro Declaration which stated as follows: 'Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.' This is an important procedural rule designed to facilitate the preventive (Principles 6 and 7 of Stockholm) and precautionary (Principle 15 of Rio)... I should like to remind the persons concerned, especially the Central Environmental Authority, that an environmental impact assessment exercise can identify the potential threats of a proposed activity or project, and that this information can then be used to modify the proposed activity in order to take these threats into account. Remedial measures can also be introduced in order to mitigate or reduce any perceived detrimental impacts of the project. In this sense, therefore, an environmental impact assessment exercise contemplated by the National Environmental Act can be instrumental in establishing exactly which areas of the proposed project or activity require precautionary or preventive measures in order to ensure the overall environmental viability of the project."

Continued next week



An Eppawela village with its Phosphate kanda

of years. Principle 10 of the Rio Declaration calls for better citizen participation in environmental decision-making and rights of access to environmental information, for they can help to ensure greater compliance by States of international environmental standards through the accountability of their governments. Principle 10 states as follows: 'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual

shall have appropriate access to information concerning the environment that is held by public authorities, and the opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided."