

Inquiries, Comments, and Suggestions on the Safeguard Policy Statement (second draft)

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DATE: 4 December 2008

Dear Nessim and Xiaoying,

The Bank Information Center (BIC) appreciates the Asian Development Bank's willingness to undertake a second round of consultations on its Safeguard Policy Update.

We welcome the opportunity to comment on the second drafts of the *Safeguard Policy Statement (SPS)* and the *Safeguard Requirements for Borrowers/Clients (Draft)*. Please find our comments attached to this communication.

Thank you and best wishes,

Mishka

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**COMMENTS ON THE ASIAN DEVELOPMENT BANK
SECOND DRAFT OF SAFEGUARD POLICY STATEMENT AND SAFEGUARD REQUIREMENTS
FOR BORROWERS/CLIENTS (OCTOBER 2008)**

SUBMITTED BY THE BANK INFORMATION CENTER¹

DECEMBER 4, 2008

The Bank Information Center (BIC) appreciates the Asian Development Bank's willingness to undertake a second round of consultations on its Safeguard Policy Update. We welcome the opportunity to comment on the second drafts of the *Safeguard Policy Statement (SPS)* and the *Safeguard Requirements for Borrowers/Clients (Draft)*.

In April 2008, we provided extensive commentary on the *Consultation Draft of the Safeguard Policy Statement* of October 2007.² Our comments emphasized two themes. *First*, we expressed disappointment that the ADB had not used the SPS process to help define the next generation of best environmental and social practices for its peer development finance institutions. We noted that the *Consultation Draft* did not improve upon the existing standards of peer institutions in any notable way, and frequently adopted policies that lag far behind those of its peer institutions. *Second*, we noted that the *Consultation Draft* made little effort to align ADB policies with relevant international conventions, codes, action plans, soft law instruments, and sectoral "best practice" standards regarding economic and social development and environmental protection.

We appreciate that the second draft strengthens ADB's policy commitments in a number of areas. But for the most part, our concerns about the *Consultation Draft* have not been adequately addressed in the current version. Like the *Consultation Draft*, the current *Draft* seems to aspire only to an *ad hoc* harmonization with *some* of the policy commitments of ADB's peer institutions. It continues to fall short of their environmental and social standards in a variety of areas, and does not adopt *any* standards that are more protective of environmental and social values than its peer institutions. Moreover, the ADB's proposed approach to a Country Systems Strategy continues to introduce significant risks that standards will be diluted further

Similarly, the current *Draft* remains generally heedless of the broad range of international legal norms and best practice standards regarding economic and social development and environmental protection. It generally fails to incorporate or explicitly reference these internationally agreed upon principles, objectives, commitments and standards.

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² [BIC Comments On ADB draft SPS \(October 2007\)](http://www.bicusa.org/en/Issue.Resources.46.aspx), April 2, 2008. (Acrobat pdf, 141 KB), available at <http://www.bicusa.org/en/Issue.Resources.46.aspx>

The remainder of this submission elaborates on these themes and discusses specific areas of ongoing concern.

1. The Need to Integrate and Explicitly Reference International Standards.

ADB has stated its objective to align its safeguard policies with those of other multi-lateral development banks. We agree with the motivation to harmonize policies with international standards. However, we believe that ADB should look beyond the work of its peer institutions for appropriate standards. It should seek to align its policies with a broader range of internationally-agreed upon principles, objectives and commitments regarding economic and social development and environmental protection. Towards this end, the revised Safeguard Policies should meet or exceed, and explicitly reference, international legal norms, best-practice standards and the work of other international organizations that have specialized responsibilities in related fields.³

ADB has supported this broader conception of harmonization in its theoretical work. In 2001, ADB commissioned a review of the international environmental legal principles and public policy criteria that directly apply to the operations of multilateral development banks (MDBs).⁴ The study concluded that, as a members of the international community, ADB and the other MDBs are “subject not only to evolving international public policy and general international law (custom and general principles of law), but also to the normative reach of those MEAs that have been adopted precisely to lay down principles and standards of global applicability.”⁵ Accordingly, MDBs no longer have unbridled discretion to set their own policies in areas that are addressed by international policy-making. Rather, they must align their lending policies with relevant international standards, such as “legal criteria endorsed by the respective conference or meeting of the parties” of applicable conventions.⁶

Several of ADB’s peer institutions, including the World Bank, the International Finance Corporation, the European Investment Bank, and the European Bank for Reconstruction and Development have begun to harmonize their safeguard policies with international standards. IFC’s Performance Standards, for example, explicitly reference relevant international standards on a number of substantive issues—including labor conditions and practices,⁷ hazardous waste and toxic pollution,⁸ pesticide use,⁹ the protection of habitats and biological diversity,¹⁰ and the protection of cultural heritage.¹¹

³ For a more complete discussion of this issue, see BIC’s *Comments on the Asian Development Bank’s Draft Safeguard Policy Statement* (October 2007), available at <http://www.bicusa.org/en/Issue.Resources.46.aspx>.

⁴ Gunther Handl, *Multi-lateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy* (Kluwer, 2001).

⁵ *Id.*, at 31.

⁶ *Id.*

⁷ International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 2: Labor and Working Conditions, para. 2 (2006).

⁸ *Id.* Performance Standard 2: Labor and Working Conditions, paras. 4-6, 11.

⁹ *Id.* Performance Standard 3: Pollution Prevention and Abatement, paras 14, 15.

¹⁰ *Id.* Performance Standard 6: Biodiversity Conservation and Sustainable Natural Resource Management, paras. 1, 9, 10.

¹¹ *Id.* Performance Standard 8: Cultural Heritage, para. 4.

The 2nd Draft explicitly incorporates international standards in a few areas such as critical natural habitats (*Draft, SR-1*, para 28) and pesticide use (*Draft, SR-1*, paras 35, 36). But for the most part, it fails to do so. For example:

- The *Draft* does not incorporate human rights norms or standards (discussed in further detail below);
- The biodiversity sections of the Environment policy do not incorporate or reference the Convention on Biological Diversity, COP decisions, the Cartagena Protocol, or any of the authoritative work of the convention bodies;;
- The Indigenous Peoples Policy does not incorporate or reference the provisions of the UN General Assembly’s Declaration on the Rights of Indigenous Peoples;

2. **Social Impacts**

2.1 ***The 2nd Draft should clarify and strengthen the requirement that environmental assessments address social impacts.***

The 2nd Draft remains ambiguous with regard to the scope of its requirements for social assessment. Some provisions express an intent to require borrowers and clients to assess social impacts, risks and opportunities as part of the environmental assessment. Towards this end, the *Draft* provides that “[t]he environmental assessment will consider all potential impacts and risks of the project on natural environment (physical and biological) and socio-economic aspects (e.g., human health and safety, physical cultural resources, and impacts on livelihood caused by project activities other than land acquisition) in an integrated way.” (*Draft SRI-Environment*, page 2, para. 4). Other provisions of the 2nd Draft suggest that project due diligence will be limited to environmental issues. Thus, the 2nd Draft defines “environmental assessment” as “an ongoing process of environmental analysis and planning to address environmental impacts and risks associated with a project.” (*Draft SRI-Environment*, page 1, para. 3). And there is a clear difference in approach between the *Environment* policy, which consistently refers to “environmental” impacts and risks, “environmental” assessments and audits, etc, and the *Involuntary Resettlement (Draft SR 2 – Involuntary Resettlement page 22, paras. 9, 10)* and *Indigenous Peoples policies (Draft SR 3 – Indigenous Peoples, Annex 1)*, which include explicit social assessment requirements.

Using the term “environment” to include some social dimensions may create needless confusion in application. We recommend that ADB follow the lead of other institutions by consistently adopting the nomenclature of an “environmental and social impact assessment” requirement.¹²

ADB should adopt an unambiguous requirement that borrowers conduct a comprehensive *social impact assessment* that includes baseline data, assessment of all impacts including cumulative

¹² See e.g., International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 1: Social and Environmental Assessment and Management Systems (2006); European Investment Bank, *The Social Assessment of Projects in Developing Countries: the Approach of the European Investment Bank* (2006); African Development Bank, *Environmental and Social Assessment Procedures for the African Development Bank’s Public Sector Operations* (2001).

and indirect impacts, and a full options assessment and evaluation of all alternatives, and analyzes the distribution of costs, benefits and risks between disparate populations.¹³

3. Human Rights

3.1 *The 2nd Draft should incorporate and explicitly reference international human rights norms.*

As a leading public, multilateral institution, ADB should be expected to pay due regard to the human rights commitments of its member governments and to properly acknowledge the authority and competence of other international bodies that have developed broadly accepted standards. It should avoid putting its imprimatur and substantial normative weight behind policy initiatives that undermine or contradict these commitments. Accordingly, its safeguard policy framework should derive its substantive content from, and explicitly reference, internationally recognized human rights.¹⁴

The explicit incorporation of human rights instruments and voluntary initiatives would serve two important functions. First, it is the best way for the ADB to ensure that its policy frameworks are consistent with internationally recognized human rights standards (and best practice approaches for implementing those standards), and to communicate to their clients that they expect them to meet their responsibility to respect those standards. Second, direct incorporation helps promote these standards and serves an important norm-reinforcement function. When the ADB explicitly references a given human rights standard or voluntary initiative, it (a) “promotes” the standard or initiative with its organizational influence and prestige; and (b) shows appropriate deference to the work of other international bodies with greater authority, legitimacy, and competence to articulate human rights standards.

ADB’s 2nd Draft entirely eschews any explicit discussion of human rights. By and large, it does not require clients to assess the potential impacts on the internationally recognized rights of affected people, or to respect those rights in project design and implementation. To cite two examples, the draft (1) fails to integrate or reference the UN Declaration on the Rights of Indigenous Peoples (2007), and improperly applies the principle of “free prior and informed consent”; and (2) fails to explicitly preclude invidious racial, ethnic or religious discrimination in the siting of hazardous or locally-undesirable industrial facilities and the allocation of project benefits and burdens.

The 2nd Draft should be revised to:

¹³ Convention on Biological Diversity, *Akwe: kon Voluntary Guidelines for the conduct of cultural, environmental and social impact assessments*; MMSD, *Breaking New Ground*; European Commission, *Communication from the Commission—Halting the Loss of Biodiversity by 2010—and Beyond: sustaining ecosystem services for human well-being* (2006); European Investment Bank, *The Social Assessment of Projects in Developing Countries: the Approach of the European Investment Bank* (2006); African Development Bank, *Environmental and Social Assessment Procedures for the African Development Bank’s Public Sector Operations* (2001); International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 1: Social and Environmental Assessment and Management Systems (2006); World Commission on Dams, *Dams and Development* (2000).

¹⁴ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Secretary-General’s Special Representative on the issue of human rights and transnational corporations and other business enterprises, para. 58, 61 (April 7, 2008).

- Include a human rights policy that commits ADB to promote, respect and help fulfill all internationally recognized civil, cultural, economic, political, and social rights, and to refrain from actions which obstruct or impede the realization of those rights.¹⁵
- Require borrowers to commit to provide prompt, effective, and adequate reparation to those persons, entities, and communities that have been adversely affected by failures to comply with these human right principles?¹⁶
- Preclude support for projects that may cause or exacerbate armed conflict.¹⁷
- Require borrowers to ensure that their security arrangements observe international human rights norms and the laws and professional standards of the host country.¹⁸
- Preclude support for any activity that supports, solicits, or encourages States or any other entities to abuse human rights, and ensure that the goods and services its clients provide will not be used to abuse human rights.¹⁹

3.2 *The 2nd Draft should require that human rights impacts and conflict risks be assessed as part of project due diligence.*

A human rights-based approach to impact assessment is critical to ensure that projects do not transgress the internationally recognized rights of affected people, and positively contribute to the realization of those rights. The 2nd Draft, however, does not require clients to systematically assess the potential impacts on the internationally recognized rights of affected people.²⁰

Accordingly, the 2nd Draft should be revised to require borrowers, as part of project due diligence, to:

- Conduct a comprehensive *human rights impact assessment* that includes baseline data, assessment of all impacts including cumulative and indirect impacts, and a full options assessment and evaluation of all alternatives.²¹

¹⁵ UN Global Compact; Universal Declaration of Human Rights, UNGA Res. 217A (III), U.N.Doc. A/810 (10 Dec 1948); the International Covenant on Civil and Political Rights, UNGA Res. 2200A(XXI) (16 Dec 1966), UN Doc. A/6316 (1966); the International Covenant on Economic, Social and Cultural Rights, UNGA Res. 2200A (XXI) (16 Dec 1966), U.N. Doc. A/6316 (1966).

¹⁶ Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, (2003).

¹⁷ US/UK Voluntary Principles on Security and Human Rights.

¹⁸ US/UK Voluntary Principles on Security and Human Rights, <http://www.voluntaryprinciples.org/>

¹⁹ U.N Global Compact; Rome Statute of the International Criminal Court (U.N. Doc. A/CONF.183/9*) (1998); Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, (2003).

²⁰ See e.g., International Finance Corporation, *Guide to Human Rights Impact Assessment* (2006); European Commission, *Communication on the European Union's Role in promoting human rights and democratization in third countries* (2001).

²¹ *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, para. 61 (April 7, 2008); International Finance Corporation, Global Compact, International Business Leader's Forum, *Guide to Human Rights*

- Conduct a *conflict impact assessment* for projects in conflict prone areas to assess the risk of provoking or exacerbating violent conflict through their operations.²²

4. Environment Policy

4.1 *The Environment Policy should incorporate and reference international standards with respect to the assessment and monitoring of environmental impacts.*

The *Draft* should be revised to:

- Adopt a precautionary approach to environmental decision-making in the face of uncertainty.²³
- Require the use of relevant independent verification schemes, such as the Kimberly Certification of diamonds and the International Cyanide Management Code.²⁴

4.2 *The Environment Policy should incorporate and reference international standards with respect to transparency and public participation in environmental decision-making.*

The 2nd *Draft* should be revised to:

- Ensure that affected communities have the right to be fully informed, including by requiring release of all impact assessments at least 120 days before the decision to finance public and private sector projects is made.²⁵
- Require sponsors of projects with significant environmental or social impacts to obtain the consent of non-indigenous affected people, or enter into negotiated agreements with them.²⁶

Impact Assessment and Management (2007); European Commission, *Communication on the European Union's Role in promoting human rights and democratization in third countries* (2001). Danish Institute for Human Rights, *Human Rights Compliance Assessment* (2004); Business Leaders Initiative on Human Rights, United Nations Global Compact Office and Office of the United Nations High Commissioner for Human Rights, *A Guide for Integrating Human Rights into Business Management* (2005); Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, E/CN.4/Sub.2/2003/12/Rev.2, (2003).

²² International Alert, *Conflict-Sensitive Business Practice: Guidance for Extractive Industries* (2005); M. Miranda, D. Chambers, and C. Coumans, *Framework for Responsible Mining: A Guide to Evolving Standards* (2005).

²³ UNEP, Rio Declaration on Environment and Development, Principle 15 (1992). The current draft adopts a precautionary approach only with respect to renewable natural resources (SPS p20, para 8) and endangered species (SR-1, p8, para 28).

²⁴ Kimberley Process, <http://www.kimberleyprocess.com>; International Cyanide Management Code For The Manufacture, Transport and Use of Cyanide In The Production of Gold, <http://www.cyanidecode.org>.

²⁵ The Draft SPS abandons the existing 120 day requirement for private sector projects. ADB, Operations Manual: Operational Procedures: Environmental Considerations in ADB Operations, para. 10. (Sept. 2006).

²⁶ World Commission on Dams, *Dams and Development*, ch 7; IFC Policy on Social and Environmental Sustainability, para 15, 19, 20. The Draft SPS uses IFC's definition of broad community support. However, while IFC's Policy says that IFC will ensure that broad community support is achieved in all consultative engagement processes, ADB requires it only where communities of Indigenous Peoples are affected. (para 47). ADB therefore does not require that consultations reach any particular outcome.

- Require private sector sponsors of extractive industries projects to disclose the amounts and conditions of all royalties, taxes and other material payments to host national, regional and local governments.²⁷
- Require such borrowers to disclose the terms of its concessions, host government agreements, and other contracts with the host government.²⁸

4.3 *The Environment Policy should incorporate and reference international standards with respect to biodiversity protection and the sustainable management of natural resources.*

The 2nd Draft should be revised to:

- Incorporate the provisions of the Convention on Biological Diversity (CBD);²⁹
- Require ADB to refuse to support the production or trade in any living modified organism, except with the approval of the importing country and as otherwise required under the Cartagena Protocol.³⁰
- Require clients to obtain consent from the country of origin for any activity involving access to genetic resources;³¹ or to operate under mutually agreed access and benefit sharing agreements with the country of origin.³²

4.4 *The Environment Policy should incorporate and reference international standards with respect to pollution prevention and abatement and the use of hazardous chemicals.*

The 2nd Draft references some important international treaties that relate to the transport and use of hazardous chemicals. Others are not mentioned. To more fully align ADB's policies with international standards, the 2nd Draft should be revised to:

- Incorporate the requirements of UNEP's Strategic Approach to International Chemicals Management.³³
- Require chemical manufacturers to test for environmental and health impacts of the chemicals they produce, and users to ensure that any chemical used has been tested for environmental and health impacts.³⁴

²⁷ EITI, *Principles and Criteria*, <http://www.eitransparency.org/>; G8, *Fighting Corruption and Improving Transparency: A G8 Declaration* (2003); International Monetary Fund, *Guide on Resource Revenue Transparency* (2007); EITI, *Investors Statement on Transparency in the Extractives Sector*; IFC, *Policy on Environmental and Social Sustainability*; Rader and Sabeter, *EITI and the Mining Sector: Stakeholder Research Report*; EITI International Advisory Group Report.

²⁸ International Monetary Fund, *Guide on Resource Revenue Transparency* (2007).

²⁹ UN Convention on Biological Diversity (1992), <http://www.biodiv.org> [CBD].

³⁰ Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000) [Cartegena Protocol].

³¹ Cartagena Protocol, article 10.

³² CBD, article 15(5).

³³ Strategic Approach to International Chemical Management (SAICM) (2006).

³⁴ The EU REACH Regulation (Registration, Evaluation, Authorisation and Restriction of Chemicals), formally adopted on 18 December 2006 by the Council of Environment Ministers, entered into force on 1 June 2007.

- Require that borrowing companies receive the prior informed consent of countries into which they will be importing chemicals listed under the Rotterdam Convention.³⁵
- Clarify that borrowers must publicly report on their pollutant releases and transfers.³⁶

5. **Indigenous Peoples Policy**

The 2nd Draft policy statement falls short of existing international standards for indigenous peoples on a number of key points: Specifically, the 2nd Draft:

5.1 *Does not reference or incorporate the UN Declaration on the Rights of Indigenous Peoples.*

Safeguard policies that are intended to benefit and protect indigenous peoples should specifically incorporate internationally-recognized indigenous rights. The International Finance Corporation, World Bank and Inter-American Development Bank have each recognized the importance of protecting the rights of indigenous peoples in the “objectives” statements of their respective indigenous peoples safeguard standards. Thus, IFC explicitly seeks to “foster full respect for the dignity, human rights, cultural and natural resource-based livelihoods of indigenous peoples;” the World Bank seeks to ensure “that the development process fully respects the dignity, human rights, economies and cultures of indigenous peoples;” and the IDB seeks to “safeguard indigenous peoples and their rights.”³⁷

The most important restatement of the rights of indigenous peoples is the UN Declaration on the Rights of Indigenous Peoples. To ensure the projects that it finances comport with international standards, the 2nd Draft should be revised to incorporate the requirements of the UN Declaration on the Rights of Indigenous Peoples.

5.2 *The Draft creates a definition of FPIC that is weaker than that which is recognized in the UN Declaration and in the international discourse on indigenous rights.*

The right of indigenous peoples to give or withhold their free, prior and informed consent (FPIC) is directly referenced and protected in Articles 10, 11, 19, 28, 29 and 32 of the Declaration on the Rights of Indigenous Peoples.

The 2nd Draft takes a welcome step forward by incorporating the principle of free, prior, and informed consent (FPIC) of indigenous peoples for certain projects that affect them. However, it fails to adopt the common understanding of FPIC expressed in international instruments, in which indigenous peoples have the authority to take collective decisions and negotiate agreements through

³⁵ Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (1998), <http://www.pic.int>.

³⁶ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (1998), at article 5 [Aarhus Convention].

³⁷ International Finance Corporation, *Performance Standards on Social and Environmental Sustainability*, Performance Standard 7: Indigenous Peoples (2006); World Bank, Operational Policy 4.10 (2005); IDB Operational Policy on Indigenous Peoples, OP-765.

their own representative governance structures.³⁸ Instead, it conflates FPIC with “broad community support” which does not necessarily provide for full use of indigenous decision-making structures.

5.3 *The Draft limits the right to FPIC to a subset of activities that affect indigenous peoples.*

Under the current *Draft*, the right to FPIC applies only in three circumstances: (1) the commercial development of indigenous peoples’ knowledge and culture; (2) physical relocation; and (3) the commercial development of natural resources.³⁹ This formulation excludes other important impacts to which FPIC should apply, such as economic displacement and dislocation, non-commercial development of lands (including protected areas) and any use of indigenous peoples’ lands. For example, the World Parks Congress has also recognized the FPIC rights of indigenous Peoples when protected areas are created that deny indigenous peoples access to their traditional lands.⁴⁰

6. Involuntary Resettlement

6.1 *The Draft does not reference or adequately protect the economic and social rights of involuntarily resettled persons.*

The policy does not explicitly refer to the economic and social rights of affected peoples. While it does require that the “income-earning capacity, production levels and standard of living” be improved or at least restored,⁴¹ and that involuntarily displaced persons are entitled to adequate replacement housing,⁴² the policy should be clear that the full range of recognized economic and social rights will not be adversely affected, and that rehabilitation measures will contribute to their realization.

6.2 *The Draft does not ensure improvement in the lives of the poor.*

As noted above, the draft requires only that the “income-earning capacity, production levels and standard of living” be improved or at least restored. The “at least restored” provision should be dropped. A development organization such as ADB should aspire to do more than return affected peoples to their current condition of poverty. Rather, resettlement programs should be conceived of as development initiatives that materially improve the livelihoods of those who are affected.

6.3 *The Draft does not prohibit discriminatory purpose or impacts in the siting of facilities that require resettlement, the identification of populations to be displaced, or the distribution of project benefits, compensation, or rehabilitation measures.*

One of the most fundamental principles of international human rights law is that all people should be entitled to the equal protection of the laws, and should not be discriminated against on the

³⁸ See, for example, the Concluding Observations of the Committee for the Convention on the Elimination of Racial Discrimination and the UN Declaration on the Rights of Indigenous Peoples

³⁹ SR-3: Indigenous Peoples, para 28.

⁴⁰ IUCN, Durban Action Plan, Vth IUCN World Parks Congress, Outcome 5, Durban, South Africa, 8-17 September 2003.

⁴¹ SR-2: Involuntary Resettlement, para. 7.

⁴² SR-2: Involuntary Resettlement, para. 5.

basis of race, color, religion, political opinion, or other invidious classification.⁴³ Too often, however, governments make decisions regarding the siting of locally-undesirable land uses, and the allocation of project benefits, costs, and risks that have discriminatory purposes or impacts. Nevertheless, while the 2nd Draft requires the project sponsor to determine if vulnerable or disadvantaged populations may be disproportionately impacted,⁴⁴ it does not necessarily prohibit invidious discrimination in decisions regarding where facilities that require resettlement will be sited, who will be resettled, and how benefits and rehabilitation efforts will be allocated.

6.4 *The Draft does not give adequate preference to land-based resettlement strategies for displaced persons whose livelihoods are land-based.*

Principle 3 of the 2nd Draft expresses a preference for land-based resettlement strategies when livelihoods are land-based. However, this preference is not reflected in the requirements in of SR-2, which appears to give borrowers the option to provide either land-based or cash compensation.⁴⁵ Only “business owners with legal rights or recognized or recognizable claims to land where commercial activities are carried out” are entitled to a preference for land-based compensation.⁴⁶ Moreover, the current draft does not require that affected people who do not have legally recognizable title to land be compensated for loss of access to land, or provided with access to replacement land.⁴⁷

6.5 *The 2nd Draft does not require that compensation and rehabilitation measures account for common property resources, cultural property, public facilities or infrastructure.*

ADB’s existing Involuntary Resettlement Policy includes detailed requirements for restoring access to common property resources such as forests, grazing lands, public facilities and cultural sites. These provisions have not been carried over to the 2nd draft, which does not require borrowers to address the loss of common property resources.

6.6 *The 2nd Draft narrows the definition of who is considered “displaced” and what actions will trigger the policy, such that not all affected people will be covered.*

International best practice on involuntary resettlement requires that any persons who are physically or economically displaced by project-related activities and impacts should be covered under involuntary resettlement safeguard entitlements.⁴⁸ However, while the current Involuntary Resettlement Policy applies to people who are displaced by “changes in land use” and “restricted access to natural resources,” the 2nd Draft applies only to the narrower category of people who are displaced by “(i) involuntary acquisition of land, (ii) involuntary restriction on land use or access to legally designated parks and protected areas, and (iii) negotiated settlement.”⁴⁹

⁴³ United Nations, *Universal Declaration of Human Rights* (Article 7); United Nations, *Convention on the Elimination of All Forms of Racial Discrimination*; United Nations, *International Covenant on Civil and Political Rights*. United Nations, *International Covenant on Economic, Social and Cultural Rights*.

⁴⁴ SR-2: Involuntary Resettlement, para. 10.

⁴⁵ SR-2: Involuntary Resettlement, para. 5.

⁴⁶ SR-2: Involuntary Resettlement, para. 6.

⁴⁷ Cf. In contrast, the Involuntary Resettlement Policy of the African Development Bank, while broadly adhering to the same compensation framework, specifies that in lieu of compensation for land, non-titled affected people should receive resettlement assistance that includes “land, housing and infrastructure” (AfDB, p. 12, III.3.4.3)

⁴⁸ World Commission on Dams, at 103.

⁴⁹ SR-2: Involuntary Resettlement, para. 3.

7. Country Safeguard Systems

7.1 The 2nd *Draft* fails to ensure that in applying a CSS approach safeguard requirements will not be diluted on paper or in practice.

The proposed approach proposes to reduce clarity in standards and introduces opportunities to redefine and diminish standards. The process, moreover, is not sufficiently transparent and participatory, and fails, completely, to ensure that financial and technical resources necessary to ensure adequate implementation are available. Finally, the approach fails to ensure adequate supervision.

7.2 The 2nd *Draft* fails to ensure that long-term substantive strengthening of country systems will occur.

The proposed approach does not require that measures to fill “gaps” in country systems are long-term measures that will last beyond the life of a given project. The potential costs in using this approach – reduce standards and accountability and financial costs – are too great to allow use of the approach without long-term substantive benefits.

Bank Information Center (BIC) partners with civil society in developing and transition countries to influence the World Bank and other international financial institutions (IFIs) to promote social and economic justice and ecological sustainability. BIC is an independent, non-profit, non-governmental organization that advocates for the protection of rights, participation, transparency, and public accountability in the governance and operations of the World Bank, regional development banks, and the IMF.

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