

Summary of Concerns and Recommendations Regarding the Review of Asian Development Bank's Environmental Safeguards

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We appreciate the Asian Development Bank's agreement to provide a second Draft Safeguard Policy Statement for public consultation and comment in November, 2008. The summary comments below are based on a detailed review by Environmental Defense Fund of ADB policies as well as those of other multilateral, bilateral and private sector financial institutions, and extensive reviews of ADB audits of projects as well as information from project-affected communities and NGOs throughout the Asia-Pacific region.

We, nonetheless, remain concerned that an agenda of dismantling existing safeguard policies is being imposed despite data -- including from the Bank's own analyses -- that indicate the need to strengthen the safeguard process and increase implementation and monitoring efforts. The second Draft SPS presents a striking weakening of ADB policy and does not represent an upward harmonization with best international practice. We urge the ADB to ensure that there is no dilution of any of the safeguard policies and that they are, in fact, strengthened with sufficient funding provided to ensure implementation in order to fully protect the environment and communities impacted by ADB projects.

We endorse the comments submitted by the NGO Forum on the ADB, of which we are a member and urge your consideration of the detailed language changes presented in the Forum comments matrix. We also endorse and encourage your consideration of the comments of the International Network on Displacement and Resettlement.

Policy Dilution

One of our strongest concerns lies with the dilution of existing policy which occurred in a multitude of ways in the 2nd draft Safeguard Policy Statement including:

- The direct weakening of safeguard requirements;
- The replacement of clear terms for implementation and processing requirements with vaguely worded language;
- The lack of integration of safeguard principles with implementation measures and requirements for borrowers and clients
- The proposed wider use of "broad-brush" safeguard frameworks which are currently not envisioned under Involuntary Resettlement and Indigenous Peoples policies;
- The proposed use of complex "country safeguard systems" without any proposed increase in resource availability or supervision;
- The proposed "derogation" or replacement of any or all safeguard requirements by individually negotiated "alternative approaches";
- The proposed increase in self-regulation, including the devolution of authority from the ADB to the Bank's clients and borrowers for important safeguard assessment, monitoring and other functions;

- The removal of language specifying a clear chain of command within the ADB for clear safeguard assessment, monitoring and compliance requirements.
- The lack of any specific resource commitments for the increased monitoring and supervision necessary to oversee the new proposed requirements.

Because of the careful, lawyerly manner in which important terms and phrases have been altered in the 2nd Draft SPS compared to existing policy, it is necessary to carefully analyze the words in the document. We were alarmed by the assertion of ADB Vice President, Bindu Lohani, during closing remarks of the November consultation session where he indicated that dilution was not “about words”. Given the careful alteration of meaningful words in the document, we feel that there is no alternative but to carefully correct the instances of weakened language. We urge you to refer to the NGO Forum on the ADB detailed comment matrix for the detailed language changes necessary to ensure that there is no dilution of existing policy.

Throughout the draft SPS, the ADB has introduced words and phrases which further modify, weaken and render vague, important policy and implementation requirements. Words such as “where applicable”, “where reasonable”, “where relevant” are placed prior to clear policy requirements without defining or specifying who makes the decision (the borrower? the ADB? Project- affected communities?) about what is “reasonable”, “relevant” or “applicable”.

In addition, the Bank has replaced the word “possible” with the word “feasible” throughout the document, as in “avoid [environmental/social harm] where possible” (as per World Bank policy principle), replaced with “avoid where feasible.” In addition the modifiers “financially and technically feasible” and “financially viable” have been added before important current policy language – including, for example, language requiring the examination of project alternatives and options.

While the ADB claims that some of the changes are as a result of "harmonization" with standards of other multilateral development banks, such as the World Bank, this has all too often not been accurate. Frequently, only a (relatively weak) portion of safeguard language from other multilateral institutions has been adopted.

Different Financial Modalities

In the midst of the global financial crisis, at a time when financial institutions are increasing their due diligence and transparency, the 2nd Draft SPS proposes the weakening of policies pertaining to a range of private sector financial modalities such as high risk private equity funds and other financial intermediaries. We have significant concerns about the implementation of safeguards for bank’s existing portfolio of private equity funds and other PSOD operations. We recommend that due diligence requirements be markedly strengthened for PSOD activities including private equity funds and financial intermediaries. The new draft proposes that public comment period be reduced by 50% to 60 days for all private sector projects, including highly risky, un-transparent, (and currently poorly managed) private equity funds.¹ In addition, all reference to project categorization for financial intermediaries has been eliminated as has current language requiring the ADB to conduct a compliance review to ensure that category A

¹ See, for example, Financial Times, November 17, 2008, “ADB probe criticises its own investments”

and B subprojects comply with ADB safeguards. Instead, authority is devolved from the ADB to the borrower, to allow the borrower to determine compliance with national laws and not with ADB safeguards. See NGO Forum comment matrix.

Operations Manual

We are deeply concerned about the draft Operations Manual which ADB staff have found “incomprehensible”. We urge a full rewrite of the manual and submission for public comment and consultation.

Environmental Assessment

Current policy requires environmental assessment to begin “as soon as potential projects for ADB financing are identified, and covers all project components whether financed by ADB, cofinanciers, or the borrower.”²

Existing policy requires the mitigation of potential adverse impacts to the level of “no significant harm to third parties,” using a “polluter pays” approach. The 2nd Draft SPS eliminates this language and no longer requires these important standards, a significant policy dilution, potentially threatening to the lives and livelihoods of millions of project-affected peoples. Recommendations: (refer to NGO Forum comment matrix)

- Require not simply “mitigation” of impacts, but prevention, minimization, compensation, and improvement of environmental performance as per WB standards; commit to a preference for “preventative measures over mitigation or compensation” as per WB; avoid “no go” zones;
- If mitigation is to occur, require that the mitigation results in the project producing “no significant harm” to affected communities or ecosystems, and insurance that the institutional basis for implementing mitigation measures, including environmental monitoring, is in place;
- Require that Environmental Impact Assessments for Category A projects be conducted by independent experts “not affiliated with the project” as per World Bank;
- Make monitoring reports of environmental and social impacts of ADB-financed projects and activities publicly available when they are written;

Greenhouse gas emissions: We commend the ADB for introducing language pertaining to GHG emissions in the SPS. We urge, however, that the Bank not only monitor GHG emissions but agree to institute a carbon dioxide cap for ADB’s portfolio. We have also made recommendations to ensure that GHG assessment language is placed in the policy principles and OM and occur “**as early as possible in the project cycle**”. **We recommend the use of best international accounting practices** such the Caisse D’Epargne carbon accounting methodology and recommend that the ADB not invest in projects which produce “significant” GHG, i.e. over 10,000 tons/CO2 equivalent/year.

Anti-Money Laundering Recommendations

- Given the link between unsustainable resource exploitation (for example, illegal logging) and money laundering³ and to ensure full compliance with anti-money laundering laws

² ADB OM/OP 9/25/06

in the borrowing country as well as the legal requirements of ADB donor countries, EA should include an assessment the involvement of “Politically Exposed Persons” (PEP) as defined by the FATF in the project. Should the project involve any Politically Exposed Persons, the project must be classified as Category A and with a 120 day public comment period. Any such project must require Board approval, after consideration of PEP involvement, prior to implementation.

Consultation and Participation:

- Ensure that ADB-supported activities and policies are implemented only after documented free prior informed consent/agreement of indigenous and other project-affected communities.
- Provide clear definition of what constitutes agreement/consent: “For purposes of policy application, agreement refers to a collective agreement by the affected peoples’ communities, through an independent and self-determined decision-making process undertaken with sufficient time. In deciding whether to proceed with a project involving such activities, the borrower/client will ascertain whether the affected provide their agreement to such activities.”
- Ensure that borrowers work in partnership with affected communities and concerned civil society organizations to ensure that (a) affected peoples receive culturally appropriate social and economic benefits; and (b) when potential adverse impacts on affected peoples are identified, these will be avoided to the maximum extent possible. Where this avoidance is proven to be impossible, and where the free, prior and informed agreement of the affected peoples’ communities has been obtained, the plan will contain measures to minimize, mitigate, and compensate for the adverse impacts designed in collaboration and partnership with affected peoples’ communities, civil society organizations and representative peoples’ authorities. The borrower/client will integrate fully the elements of the plan into the project design.
- Ensure that the project design and legal covenants specify how benefits accrue to affected peoples in the project’s area of influence and ensure a continuing relationship with affected communities including full and effective consultations throughout the project cycle.
- Ensure full documentation of agreements with communities including (i) the findings of the environmental assessment; (ii) the process of full and effective consultation with the affected peoples’ communities; (iii) additional measures including project design modification, that may be required to address adverse impacts on the affected peoples and to provide them with culturally appropriate project benefits; (iv) recommendations for full and effective consultations with and participation by affected peoples’ communities during project implementation, monitoring and evaluation; and (v) any formal agreements reached with affected peoples communities and/or the affected peoples organizations.

International Standards

³ A 2005 report by the Center for International Forestry Research underscores the intersection between money laundering and forest destruction. In Indonesia, high-risk forest-based projects often involve crimes such as illegal logging or the pollution of water and air by dangerous waste, leading to significant legal risks to banks. Indonesia’s new laws make financial institutions responsible for transactions involving forestry and environmental crimes. Illegal logging as a “predicate offence” for money laundering, meaning that money laundering charges and strict penalty schedules can now be applied to financial institutions engaged in projects that involve illegal timber harvesting.

Commit to international standards including those pertaining to human rights, biodiversity, such as the Convention on Biological Diversity, the Cartagena Protocol, and the UN General Assembly's Declaration on the Rights of Indigenous Peoples **sustainability and a rights-based approach** where recognition of rights and assessments of risks provides the basis for good faith agreements

Cofinancing:

- ADB's current requirement that all components of a project must comply with ADB's environmental assessment policy, regardless of whether or not ADB is financing a particular component, is positive and should be maintained.

Grievance mechanism. Ensure that any local grievance mechanism does not impede access to the country's judicial or administrative remedies or impede, delay or, restrict use of the ADB's accountability mechanism. Use of the project-level grievance mechanism should be optional for affected people, should not replace the accountability mechanism and should not be a condition of eligibility for assessing the accountability mechanism.

120 Day Comment Period:

The new draft proposes the reduction of the important required 120 day public comment period on environmental impact assessments for all projects by 50% (to 60 days) for private sector projects. The 120 day public comment requirement serves a vital safeguard function given the complexity of project documents, including environmental impact assessments which often run as long as 800 pages, the ADB's poor track record with safeguard implementation – as stated in numerous staff reports - and the need to ensure proper consultation with and consent from affected communities – a process too often neglected by project proponents.

This alarming 50% reduction in public comment period for private sector projects raises numerous problems. It appears that the Bank is making special concessions to the private sector when it comes to observing the safeguard policy requirements -- compromising on environment information disclosure, safety, and impact mitigation. This should not be the way to attract private investment. The current global financial crisis has amply demonstrated the risks of self-regulation. On the contrary, the ADB should demonstrate leadership when it comes to compliance requirements for consultation, information disclosure and environmental mitigation. In addition, differentiated disclosure procedures applied to public and private sector projects create a significant problem when lending is provided on a "mixed" basis with both public and private sector funding components.

Categorization

The current draft SPS proposes to entirely eliminate the current requirement for the categorization of projects involving involuntarily resettlement and indigenous peoples as part of a proposed "harmonization" with World Bank standards. Categorization of projects is important because it draws the immediate attention of compliance staff, managers, Executive Directors and the public to projects which may need especially carefully monitoring.

In addition, under current policy, there is a clear chain of command regarding responsibility for project assessment where the ADB's Chief Compliance Officer is required to sign off on project assessment and categorization decisions. This chain of command, including clear departmental responsibility and accountability for project assessment and categorization, has been eliminated in the Draft SPS.

In contrast to the ADB's plan to fully eliminate categorization for projects involving involuntary resettlement or indigenous peoples, the World Bank requires that projects which fall under their Indigenous Peoples or Involuntary Resettlement Policies are automatically classified as "Category A" (significant impact) under the umbrella of the environmental safeguard policy. The ADB's current draft Safeguard Policy eliminates all categorization on the basis of social impacts, but, unlike the World Bank does not require projects which involve resettlement or indigenous peoples to be labelled as "Category A" under the umbrella environment policy. Such projects are not categorized at all. This represents not only a significant dilution of existing ADB policy but also a "dilution of harmonization" with other multilateral development banks.

We recommend that the ADB re-instate language from existing policy pertaining to role of Chief Compliance Officer and chain of command for project assessment and fully harmonize with World Bank categorization practices pertaining to categorization of projects impacting indigenous peoples or involving resettlement. .