

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

TO: safeguards_update@adb.org

FROM: kherbertson@wri.org

DATE: 4 December 2008

Dear Sir or Madam:

Please find attached comments from the World Resources Institute on the 2nd draft of the Safeguard Policy Statement. Please let me know if you have any questions or would like any clarifications.

Best regards,
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Comments on Asian Development Bank's Safeguard Policy Statement December 2008

The World Resources Institute participated in the ADB's consultations on the Second Draft of the Safeguard Policy Statement in Manila on 19-21 November 2008. We appreciated the opportunity to provide input into the consultation, and based on these discussions would like to recommend several revisions for the next draft:

1. Incorporate the UN Declaration on the Rights of Indigenous Peoples into the ADB Safeguard Policy Statement.
2. Require free, prior and informed consent for all projects potentially affecting indigenous peoples.
3. Clarify the scope of the Safeguard Policy Statement.
4. Provide further policy criteria for the establishment of project-level grievance mechanisms.
5. Strengthen the role of the ADB Accountability Mechanism in the safeguard system.
6. Improve the process for adopting Country Safeguard Systems into ADB operations.

Incorporate the UN Declaration on the Rights of Indigenous Peoples into the ADB Safeguard Policy Statement.

When the UN General Assembly adopted the UN Declaration on the Rights of Indigenous Peoples in September 2007, all states in Asia voted in favor of the declaration except for Azerbaijan, Bangladesh, Bhutan, and Samoa, which abstained. At the ADB safeguard policy consultation in November 2008, representatives of several Asian governments including China and India expressed support for the Declaration. To incorporate the UN Declaration into the ADB safeguard policy, we recommend the following steps:

Explicit incorporation of the Declaration. As part of the W-Paper, ADB should express its commitment to implement the Safeguard Policy Statement in a manner that is consistent with the UN Declaration.

Implicit incorporation of the Declaration. Where possible, the language of the Policy Principles on Indigenous Peoples and Safeguard Requirement #3 should mirror the language of the UN Declaration. This is particularly relevant for free, prior and informed consent (discussed below).

Require free, prior and informed consent (FPIC) for all projects potentially affecting indigenous peoples.

We are encouraged by the ADB's recognition in the current draft of indigenous peoples' right to free, prior and informed consent. However, to ensure consistency with the UN Declaration, we recommend the following revisions to the current draft:

Definition of free, prior and informed consent. SR3, paragraph 29 states that "In deciding whether to proceed with a project involving such activities, the borrower/client will ascertain whether the affected Indigenous Peoples communities provide their broad support to such activities." This statement implies that the *borrower/client determines* the existence of broad community support.

However, a fundamental principle underlying FPIC is that *communities themselves determine* whether to support a project. To ensure consistency with the UN Declaration, we recommend the following language for paragraph 29:

“29. For purposes of policy application, consent refers to a collective expression by the potentially affected Indigenous Peoples communities, reached through an independent and self-determined decision-making process undertaken with sufficient time and in accordance with their cultural traditions, customs and practices, of broad community support for a proposed project. Such consent does not necessarily require support from every individual.”

Roles of the borrower/client and ADB in the consent process. SR3, paragraph 30 describes the roles of the borrower/client and ADB in the determination of consent. The communities themselves make the determination of whether to give consent to a proposed project, and this determination must be free of coercion or influence by the borrower/client. However, it is important for the borrower/client to engage affected communities throughout the impact assessment and project design processes, so that communities better understand the risks and benefits of the project. Through ongoing dialogue, the borrower/client may be able to design the project and mitigation measures in such a way that the community gives consent. While the ADB is not involved in the day-to-day community engagement process, ADB plays an important role in monitoring the process and verifying the ongoing existence of consent throughout the project cycle. Additionally, ADB should publicly report on its findings on this process. As such, we recommend the following language for paragraph 30:

“30. Where there is such free, prior and informed consent, the borrower/client will provide documentation that details the process and outcomes of consultations with Indigenous Peoples and Indigenous Peoples organizations, including (i) the findings of the SIA; (ii) the process of consultation with the affected Indigenous Peoples’ communities; (iii) additional measures including project design modification, that may be required to address adverse impacts on the Indigenous Peoples and to provide them with culturally appropriate project benefits; (iv) plans for ongoing consultations with and participation by Indigenous Peoples’ communities during project implementation, monitoring and evaluation; and (v) any formal agreements reached with Indigenous Peoples communities and/or the Indigenous Peoples organization. The borrower/client will submit to ADB the documentation of the engagement process for review, and the ADB will publish the documentation on its website prior to commencement of project activities. In addition, ADB will verify through its own investigations the ongoing existence of consent for the proposed project. The ADB will disclose the findings of its investigations to affected communities and on its website. The project will not be financed by ADB if such consent does not exist.”

Scope of free, prior and informed consent. SR3, paragraph 28 lists three project activities for which ADB requires FPIC. The UN Declaration, however, requires FPIC for a somewhat different set of activities. We recommend that ADB apply FPIC in a manner that is consistent with the language of the UN Declaration, articles 10, 11, 19, 28, and 32. For example, SR 3, paragraph 28 might read:

“28. Indigenous Peoples may be particularly vulnerable when project activities: (i) affect their lands or territories and other resources, including in connection with the development, utilization or exploitation of mineral, water or other resources; (ii) include relocation from their lands or territories; (iii) have impacts on their livelihoods, or their cultural, intellectual, religious, or spiritual property; or (iv) involve the implementation of legislative or

administrative measures that may affect them. If such activities are likely to occur, the following special requirements will also apply in addition to the requirements above. Common to these requirements is the need for the borrower/client to apply the principle of free, prior and informed consent of Indigenous Peoples before starting such projects.”

Clarify the scope of the Safeguard Policy Statement.

The current draft of the SPS eliminates the standard A, B, C, and FI categorization system used at most other multilateral financial institutions. In its place, the ADB proposes to adopt a complex system of standards to various types of financing modalities (see Annex for a description of the various standards introduced into the draft). The potential implications are that: ADB presents staff and clients with a potentially unpredictable, unclear, and inconsistent safeguard system; and that application of the safeguards may lose significant leverage in project decision-making at the ADB.

As such, we recommend that ADB categorizes all projects and financing activities according to a consistent A, B, and C categorization system. This allows clients and staff to rely upon a clear set of internationally recognized standards for screening potential project risks and impacts. We further recommend that the ADB consistently apply all of the Safeguard Policy Statement (including the Safeguard Requirements) to all of its activities. Currently, the ADB selectively applies combinations of the policy principles, general and specific aspects of the Safeguard Requirements, and ad hoc arrangements with borrowers/clients. In particular, by distinguishing between general and specific requirements, ADB omits application of free, prior and informed consent and other safeguard protections for indigenous peoples in several types of financing modalities.

Provide further policy criteria for the establishment of project-level grievance mechanisms.

For several years, the IFC and World Bank have advised clients to establish grievance mechanisms through which local communities can raise their concerns, in order to mitigate the environmental and social risks of high impact projects. While many borrowers/clients now recognize the benefits of such mechanisms, they increasingly look towards multilateral financial institutions for guidance on how to design and implement these mechanisms. The IFC, for example, has responded to this demand in two ways: by including basic criteria for grievance mechanisms in its Performance Standards, and by providing more details in the form of a “guidance note,” scheduled to be published in 2009.

The current draft of the ADB Safeguard Policy Statement provides little to no description of what a grievance mechanism is. Rather, Paragraph 69 only states that “The SPS requires that the borrower/client establish and maintain grievance mechanisms to receive and facilitate resolution of affected peoples’ concerns and grievances about social and environmental performance of projects.” While ADB and the Accountability Mechanism have expressed plans to develop a guidance note on grievance mechanisms in the future, we recommend that the Safeguard Policy Statement includes basic criteria to help clarify for borrowers/clients what a grievance mechanism entails. While grievance mechanisms will vary in size and scope among different projects, several criteria apply to all such mechanisms:

“69. Project-level Grievance Mechanism. The SPS requires that the borrower/client establish and maintain grievance mechanisms to receive and facilitate resolution of affected communities’ concerns and grievances about social and environmental performance of

projects. The grievance mechanism should be designed with the input of affected communities, and where possible should be based on dialogue or mediation between affected communities and relevant project decision-makers. The grievance mechanism should record and track all grievances, and should report regularly to communities on the status of ongoing and resolved cases. The mechanism should not impede access to judicial or administrative remedies.”

Strengthen the role of the ADB Accountability Mechanism in the safeguard system.

Presumably, ADB’s Accountability Mechanism will continue to play a central role in identifying and resolving concerns during implementation of the safeguard policies. However, the draft Safeguard Policy Statement raises several potential implications for the Accountability Mechanism:

Relationship between the Accountability Mechanism and grievance mechanisms. As many participants pointed out during the ADB multistakeholder consultation, paragraph 69 creates links between the project-level grievance mechanism and ADB’s Accountability Mechanism. The language in this paragraph implies that affected communities must use the project-level grievance mechanism before accessing the ADB’s Accountability Mechanism.

The procedures of the Accountability Mechanism require complainants to approach the borrower/client and ADB management before accessing the Mechanism. However, the current Accountability Mechanism procedures allow flexibility for communities to choose how to approach the borrower/client and ADB management, which is important because of the occasional tensions and distrust that underlie community grievances.

In contrast, the proposed SPS language removes this flexibility, and requires communities to first use a vaguely-defined “grievance mechanism” before accessing the Accountability Mechanism. If the grievance mechanism is ineffective or perceived as unfair, communities may choose not to use the Accountability Mechanism. During the ADB multistakeholder consultations, it became apparent that this link was unintentional. We recommend that the language on “Project-level Grievance Mechanisms” and the “ADB Accountability Mechanism” be placed in separate paragraphs.

Role of the Accountability Mechanism in Country Safeguard Systems (CSS). The draft does not explain the role of the Accountability Mechanism under the CSS initiative. Will communities affected by a CSS project be able to bring complaints to the Accountability Mechanism? How will the Accountability Mechanism develop the capacity to assess the laws, policies, and other elements of national safeguard systems? We urge ADB to more closely consider these issues.

Awareness of the Accountability Mechanism. Finally, we recognize that the Accountability Mechanism plays an integral role in the ADB’s safeguard system. As a result, it is essential that affected communities are aware of the existence of the Accountability Mechanism, just as they are aware of the existence of the environmental impact assessment. We recommend that ADB include a provision in the W-Paper that requires borrowers/clients to inform affected communities of the existence of the Accountability Mechanism, and that this requirement be integrated as a covenant into all ADB financing contracts.

Improve the process for adopting Country Safeguard Systems into ADB operations.

The Accra Agenda for Action commits donors to use country systems to the maximum extent possible. Paragraph 15(d) provides that:

“Donors will immediately start working on and sharing transparent plans for undertaking their Paris commitments on using country systems in all forms of development assistance; provide staff guidance on how these systems can be used; and ensure that internal incentives encourage their use. They will finalise these plans as a matter of urgency.”

While ADB has commendably taken steps to adopt Country Safeguard Systems as quickly as possible, ADB’s process thus far raises several concerns. For example, ADB has not shared “transparent plans” during its development of CSS, provided “staff guidance on how these systems can be used,” or ensured “that internal incentives encourage their use.” We are concerned that by moving ahead of the World Bank’s efforts to develop CSS, ADB risks: (1) creating future complications for the harmonization of CSS across multilateral financial institutions, to the detriment of borrower countries; and (2) undermining ADB’s draft safeguard policies, to the detriment of local communities, by diverting technical, budgetary and staff resources away from safeguard implementation.

As such, we strongly urge ADB to consider a more cautious approach to adopting CSS. Key elements of this approach would include:

Create separate tracks for the approval of Safeguard Policies and CSS. We recommend that the W-Paper on the Safeguard Policies omit mention of CSS. Rather, we suggest that ADB staff complete further pilot programs and a feasibility study for Board review before formally adopting a separate CSS policy.

Complete pilot programs in cooperation with the World Bank. The draft CSS language in ADB’s safeguard policy statement is largely based on the “equivalence and acceptability” approach used in the World Bank’s program “Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects” (OP 4.00). The key objective of this program is “to improve overall understanding of implementation issues related to greater use of country systems.” However, the World Bank has not yet completed its pilot studies on country safeguard systems. (Para. 1) As the ADB’s Office of General Counsel notes in an August 2007 memorandum:

“[T]he World Bank’s current experience reveals, that: (i) costs are major issues and the costs of preparing CSS projects and conducting country assessments are significantly higher than for other projects; (ii) World Bank staff are cautious about working on such projects because of the costs and time delays and concerns about management’s commitment to CSS; (iii) World Bank DMCs are expected to be reluctant to borrow for strengthening CSS; (iv) the social safeguard policies (involuntary resettlement and indigenous peoples) are less conducive to CSS because borrower countries do not have equivalent social CSS; (iv) [sic] effective use of country systems requires World Bank staff to become more knowledgeable of national and sub-national policies, laws and procedures, something they currently have limited incentives to do; and (v) [sic] the World Bank Board requested management to defer a new proposal to pursue pilot CSS at the country level until management had completed its

evaluation of the pilot CSS at the project level.” (Memorandum to Acting Director General, 23 August 2007)

We encourage the ADB to work alongside the World Bank in completing the pilot program, rather than formalizing a policy before it has been completely tested.

Undertake a feasibility study subject to a public comment period. Because of the complexities and transformative nature of CSS, we recommend that ADB submit to the Board a feasibility study prior to developing formal policy language. A draft of this feasibility study should be open to public comments before Board approval, so that ADB can benefit from a wide range of expertise, experience, and concerns. The feasibility study should provide both recommendations as well as supporting research and data analysis.

Such a feasibility study should address key issues such as: (1) applicability of the World Bank’s experiences to the ADB; (2) lessons learned from ADB’s own pilot studies; (3) challenges and strategies for harmonization of CSS across the multilateral development banks; (4) challenges and strategies for overcoming resources constraints at the ADB; (5) plans for monitoring CSS implementation during and after project implementation; (6) plans for public disclosure and consultation during development of equivalency and acceptability assessments, actions plans, and monitoring; (7) plans to implement gap-filling measures, including how ADB will determine when a borrower/client can “deliver the principles of ADB’s SPS” and “is committed to doing so.”

Identify and commit the necessary resources to implement CSS. CSS will involve widespread systematic changes across the ADB. In effect, for CSS to work it must be “mainstreamed” into ADB operations. Such widespread reforms require a careful identification of what resources must be in place, and an institution-wide commitment to dedicate these resources. Necessary resources may include:

- Budget. How much will CSS cost? Will it reduce costs for ADB and borrowers/clients?
- Staff. Which staff and departments will be involved in CSS assessment, implementation, and monitoring? What staff incentives are in place to use CSS? What staff areas of expertise are needed?
- Clear Lines of Authority. Which departments will handle the various aspects of CSS implementation? Who will incorporate CSS into country partnership strategies? Who will incorporate CSS into projects? Who will oversee implementation of the equivalency action plan? Who will oversee implementation of the acceptability action plan? Who will monitor CSS during the life of the project? Who will monitor CSS after the project concludes? Who will monitor changes in each country’s safeguard system over time? What are the roles and responsibilities of the ADB safeguards unit? What are the roles and responsibilities of the borrower/client? Will OGC provide support for the assessment of each country’s legal systems? Who will negotiate CSS gap-filling measures? Who will determine if a borrower/client is “committed to doing so” with respect to future gap-filling measures? Who will correct instances of non-compliance?
- Harmonization. What procedures will be in place for coordination and ongoing communication with the World Bank and its various departments involved in CSS?
- Access to Information. What information must borrowers/clients provide for desk reviews of country systems? Who will conduct field reviews of country safeguard systems—how will

ADB assess related governance and corruption issues? How and when will ADB seek public input into assessments and design of action plans? What staff capacity building, training, and reference materials need to be in place? What performance indicators will be used to measure the success of the CSS initiative?

For questions or clarifications, please contact:

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ANNEX: SCOPE OF THE SAFEGUARD POLICY STATEMENT

Text	Type of Financing Activity	Does the ADB apply environmental and social safeguards?	Which Safeguards Apply?			
			Policy Principles	“General” SRs	“Specific” SRs	Other
Projects in General						
Page 20, Para 58	<ul style="list-style-type: none"> Impacts environment 	<p>Application of safeguards depends on whether the project is classified as Category A, B, or C:</p> <p>A: “likely to have significant adverse environmental impacts that are irreversible, diverse, or unprecedented on human populations, biodiversity or natural resources” → full environmental impact assessment</p> <p>B: “potential adverse environmental impacts are less adverse than those of Category A projects. These impacts are site-specific, few if any of them are irreversible, and in most cases mitigation measures can be designed more readily than for Category A projects” → initial environmental examination</p> <p>C: “likely to have minimal or no adverse environmental impacts” → no assessment beyond screening and desk review</p> <p>FI: “involves investments of ADB funds to or through a financial intermediary”</p>	Yes	Yes	Not applicable	
Page 20, Para 59	<ul style="list-style-type: none"> Includes involuntary resettlement 	Safeguards apply. Resettlement plan prepared “commensurate with the extent and degree of the impacts”	Yes	Yes	Not applicable	
Page 21, Para 60	<ul style="list-style-type: none"> Affects indigenous peoples 	Safeguards apply. Indigenous Peoples plan prepared “commensurate with the degree of impacts”	Yes	Yes	Yes	

Text	Type of Financing Activity	Does the ADB apply environmental and social safeguards?	Which Safeguards Apply?			
			Policy Principles	“General” SRs	“Specific” SRs	Other
Page 24, Para 71-72	<ul style="list-style-type: none"> Has subprojects delivered after Board approval 	Applies to each project fitting this category	No	No	No	ADB and Borrower/Client agree on a “safeguard framework”
Financial Intermediaries						
Page 24, Para 74; SR 4, Para 15-16	<ul style="list-style-type: none"> General 	Depends on the level of potential impacts and risks associated with the FI’s business activities, capacity of environmental and social management, and the type of financing modality provided by ADB	No	No	No	All FIs will establish “an appropriate environmental & social management system” If the FI’s business activities have minimal or no adverse impacts or risks, no other specific requirements applied
Page 25, Para 76; SR 4, Para 18	<ul style="list-style-type: none"> Targeted subprojects 	Applies if the subprojects have “potential significant social or environmental impacts and risks”	?	Yes	Yes	
Page 25, Para 76; SR 4, Para 20	<ul style="list-style-type: none"> Non-targeted subprojects 	Applies to each project fitting this category	No	No	No	Compliance with national laws and standards
Co-financing Projects						
Page 26, Para 79	<ul style="list-style-type: none"> Has project-specific contractual commitment 	Applies to each project fitting this category	Yes	Yes	Yes	
Page 26, Para 79	<ul style="list-style-type: none"> Has formal arrangements with financing partner 	If ADB is satisfied that the financing partner has safeguards at least equivalent to its own, the financing partner’s safeguards may apply.	Maybe	Maybe	Maybe	
Page 26, Para 79	<ul style="list-style-type: none"> No formal arrangement with financing partners 	Applies to each project fitting this category	Yes	Yes	Yes	
Program Loans						
SR 4,	<ul style="list-style-type: none"> General 	Applies if “likely to have direct or	No	No	No	Env: Borrower/client prepares

Text	Type of Financing Activity	Does the ADB apply environmental and social safeguards?	Which Safeguards Apply?			
			Policy Principles	“General” SRs	“Specific” SRs	Other
Paras 2-3		indirect relatively significant environmental impacts” Applies if “likely to have direct or indirect significant involuntary resettlement impacts or effects on Indigenous Peoples”				a strategic environmental assessment IR and IP: Borrower/client assesses the impacts, identifies appropriate mitigation measures, and incorporates them into program design
SR 4, Para 4	<ul style="list-style-type: none"> Includes an investment component 	Applies to each project fitting this category	?	Yes	No	
Sector Finance						
SR 4, Para 5	<ul style="list-style-type: none"> General 	Applies if “potential environmental or involuntary resettlement impacts or impacts on Indigenous Peoples”	No	Yes	No	ADB and Borrower/Client agree on a “safeguard framework”
	<ul style="list-style-type: none"> Investment involves development or change to sector program 	“Likely to have significant environmental and involuntary resettlement impacts, or effects on Indigenous Peoples”				Envt: Borrower/client prepares a strategic environmental assessment IR and IP: Borrower/client assesses the impacts, identifies appropriate mitigation measures, and incorporates them into program design
Multi-tranche Financing Facilities						
SR 4, Paras 11-12	<ul style="list-style-type: none"> General 	Applies to each project fitting this category	No	Yes	No	ADB and Borrower/Client agree on a “safeguard framework”
Emergency Assistance Loans						
SR 4, Para 13	<ul style="list-style-type: none"> General 	Applies when completion of standard safeguards “may not be possible”	No	Yes	No	ADB and Borrower/Client agree on a “safeguard framework”
Existing Facilities						
SR 4, Para 14	<ul style="list-style-type: none"> General 	Applies to each project fitting this category	No	No	No	ADB requires an environment and social compliance audit to

Text	Type of Financing Activity	Does the ADB apply environmental and social safeguards?	Which Safeguards Apply?			
			Policy Principles	“General” SRs	“Specific” SRs	Other
						identify past or present concerns
General Corporate Finance						
SR 4, Paras 21-22	<ul style="list-style-type: none"> General 	Applies to each project fitting this category	No	No	No	ADB may require corporate audit; scope is agreed on “a case-by-case basis”