

April 28, 2008

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Asian Development Bank

Dear Mr. Ahmad:

As we formally submit our analysis and critique of the draft Safeguards Policy Statement (SPS), we renew our collective call for the Asian Development Bank to strengthen and not to debase its existing operational policies on environment, Involuntary Resettlement, and Indigenous Peoples. We believe that environmental and social safeguards that fully respect human rights and international law are fundamental instruments that protect ecosystems and communities against badly conceived ADB projects, programs and operations. We urge the Bank to revisit its underlying motivation and mindset under which the safeguard policies are now being revised and the implications of such a revision to the ADB's shareholders with respect to the stakeholders that are supposed to be the prime beneficiaries of the Bank's projects and programs.

Herewith are the comments of the NGO Forum.

Welcome Provisions

There are positive provisions in the SPS which we welcome. For instance:

- Inclusion of a Prohibited Investments List;
- Recognition of the absence of formal legal title to land by affected person as not a hindrance to compensation;
- Payment of compensation and provision of entitlements before physical or economic displacement;
- Disclosure of draft resettlement plans and monitoring reports;
- Consideration of direct and indirect project impacts on people's human rights, dignity, and livelihood of indigenous communities;
- Removal of the Category B-sensitive classification in environment assessments; and
- Requiring the conduct of safeguard due diligence for financial intermediaries that is absent in the current environment policy.

General Views

Overall, however, we see a deliberate attempt on ADB's part to push for dangerous mechanisms that, in effect, would wash the Bank's hands off responsibilities inherent in its operations among its Developing Member Countries (DMCs). In our view, the Bank is a development institution that is accountable to the social and environmental impacts that its projects may or have already caused. It cannot just simply shift its oversight function to borrowing countries under the proposed Country Safeguards Systems (CSS) and Framework Approach. Under the CSS, for example, the Bank will be dependent on the DMCs' political space, governance and judicial systems, anti-corruption mechanisms, and domestic capacity to implement its own environmental and social safeguards, provided there is equivalence with ADB safeguards.

The weakly-formulated Policy Principles, including stated objectives and scope for the environment, involuntary resettlement and Indigenous peoples, has confirmed our worst fears that the SPS is a watered-down version of existing Safeguard policies. The policy statements fail to even reference rights-based approaches. In addition, the policy statement on Indigenous Peoples (IPs) does not cite to the UN Declaration on the Rights of Indigenous Peoples. For instance, the draft policy downgrades free prior informed consent of IPs to free prior informed consultation, which runs counter to what is stipulated in the UN declaration. In general the three policy statements lack the legal teeth necessary for compliance and implementation by the ADB and its borrowing clients.

We also take strong exception to the SPS provision that does not automatically mandate the ADB to take legal sanctions on erring governments or clients that violate loan covenants and agreements, particularly concerning social and environmental safeguards. We view this as kid-glove treatment of borrowers; it gives them excessive leeway for non-compliance with the ADB's operational policies, which is inimical to the interests of affected communities and environments.

The draft policy also completely removes the 120-day disclosure period for environmental impact assessments (EIAs) and other documentary requirements for projects and programs prior to ADB Board approval. This undermines the rights of affected peoples and other stakeholders to timely, accessible and easily-understood information as well as robust and meaningful consultation vis-à-vis ADB operations, which threaten to disrupt lives and destroy livelihoods and environs. The Bank seems bent on reducing the time period of the project cycle to sidestep people's rights and thus enable itself to disburse more funds within a shorter period.

In terms of language, the SPS is saddled with clarity, coherence and consistency issues. There is an obvious lack of rigor given the use of generalizations and fuzzy terminologies. Most seriously, the document does not carry clear recommendations concerning timelines, responsibilities, and resources.

Issues of greater concern become more apparent, however, with the more we focus on SPS details.

Specific Comments

A) Country Safeguards System (CSS)

- Country Safeguards is defined as *"a country's legal and institutional framework, consisting of its national, sub-national, or sectoral implementing institutions and relevant laws, regulations, rules and procedures, which pertain to the safeguards policy areas"* [Par. 57, Page 21]. We are seriously concerned about the hurried timing and dubious insertion of the CSS in the SPS with regard to the agenda of the ADB. In keeping with the Bank's pronouncements that the *"SPU is intended to articulate the safeguard requirements to improve their clarity, coherence and consistency"* [Par. 2, Page 1], the Bank should defer the CSS discussion as it tends to muddle the SPU, and undermine the "in-good-faith" SPU consultation process with the CSOs.

The results of the 2005 Technical Assistance (TA) for the on-going analytical studies and assessments of country safeguards systems in five DMCs: People's Republic of China, India, Kyrgyzstan, Philippines and Vietnam have yet to be completed and disclosed. This brings to fore the issue of selection of CSS pilot countries. According to the TA report, *"The selection of countries will be based on the assessment of policy application and country safeguard capacity issues related to ADB-financed operations"*¹. The ADB has yet to present clear-cut parameters for the assessment. What is the track record of these five countries to merit the Bank's interest? (It is interesting to note that in the 2007 Corruption Perception Index Regional Highlights in the Asia Pacific Region, Eastern Europe and Central Asia, these five pilots registered below "5", indicating that they face serious levels of domestic corruption².)

- Since the ADB patterned its CSS after the World Bank's, it is but logical for the former to look into what has been done by the latter. So far, the 2004 country system pilot tests have not yielded impressive results. In the WB document dated January 2008, it says *"Evaluation of the Initial Phase of the Pilot Program for Use of Country Systems for Environmental and Social Safeguards: Lessons Learned and Management Proposal for an Incremental Scale Up of the Program"*. It is apparent that the WB is opting for a more modest stance in its CSS implementation as evidenced by the "incremental scaling up of the program", which is evidently a euphemism for taking a more cautious approach.

¹ ADB (2005), *Technical Assistance for Strengthening Country Safeguards Systems*, Project No- 39186, Technical Assistance Report, Asian Development Bank: Manila, [online: web] Accessed on 21 March 2008, URL: <http://www.adb.org/Documents/TARs/REG/39186-REG-TAR.pdf>

² China (3.5) ranks 12th in Asia Pacific Region country rank; India (3.5), also 12th in the regional rank; Kyrgyzstan (2.1) in Eastern Europe and Central Asia; Philippines (2.5) ranks 2nd; Vietnam (2.6) ranks 20th. Transparency International (2007), *Corruption Perceptions Index- 2007*, [Online: web] Accessed on March 22, URL: http://www.transparency.org/news_room/latest_news/press_releases/2007/2007_09_26_cpi_2007_en

Further, the ADB states that only a few countries have expressed interest to apply for the country systems.³ This puts into question the Bank's motivation to spend considerable time and resources developing this system when clearly this would not be applicable to most DMCs at this point. What the Bank should do first is to develop the respective safeguard systems of its DMCs to meet ADB's standards (e.g. countries like India seem to have less than strong policies and regulations on pest management, hazardous waste management, and transboundary environmental problems). In turn, this would require the Bank to allocate considerable resources to support its DMCs efforts to improve country safeguards, institutional resources, expertise, implementation of projects, and the establishment of a strong monitoring and evaluation system.

We caution the Bank against overestimating the capacity of a number of DMCs to expeditiously make their policies and statutes at par with international standards and best practices. It takes years to legislate or revise existing laws and regulations, notwithstanding any ADB grant or loan that seeks to speed up the process. Country ownership of development initiatives are not under question. Sovereign nations should have the right and responsibility to decide the policies that should guide their needs and activities. Therefore, Bank reliance on a DMC's current capacity and existing systems would, in most likelihood, lead to further violations of the ADB Safeguard policies.

- Equivalency and Acceptability Assessment *"are two criteria for deciding on CSS. ADB would consider a borrower's CSS to be equivalent to ADB's, if the borrower's system to achieve the objectives and adhere to the applicable policy principles set out in ADB safeguards. ADB also assesses the acceptability of borrower's/client's implementation capacity, including track record and practices, before deciding on the use of the borrower's system"* [Par. 12, Page 42]. The draft SPS does not demonstrate how the Bank will, at the operational level, address these concerns. A more detailed methodology and clearly defined criteria for evaluating equivalence and acceptability is needed, ensuring that substantive requirements and inherent obligations of the Bank (as loan provider) are enforced. We urge ADB to comply with international agreements. The process of determining equivalence and acceptability requires a more rigorous approach (e.g. tool for understanding capacity and readiness) as well as more substantial resources. There is also the question of who will validate matters after the assessment and determination of equivalence? Thus, we view the timing of adoption may be premature and inappropriate.
- The section on gap-filling measures raises concerns such as the timing of adoption (is it before implementation and not before project approval?); applicable benchmarks or standards (track record or best practices that ascertain capacity to implement such systems?); implementing entity (use of CSS in the context of private sector investment?) and accountability (ADB to "fork in" in the process?). It is also anticipated that the use of CSS requires enhanced supervision by the Bank, which in turn necessitates expert capacity of Bank personnel. Significant workload in monitoring and evaluation should be anticipated. This opens up questions on ADB's competence as a professional capacity development provider. We ask the ADB to ascertain whether it has sufficient expert staff to advise, monitor and evaluate the CSS in a sustained manner. Can the Bank deliver such an ambitious program vis-à-vis its overly optimistic timeline?
- *"ADB's safeguard policies require that both ADB and DMC safeguard requirements must be met"* [Par. 10, Page 4]. However, the adoption of CSS would mean that the discourse on safeguards will also shift to the country level. *"TA proceeds will be used to organize country consultations on the possible application of country systems and discussions on policy and procedural commonalities. This will be done in collaboration with governments, executing agencies and civil society organizations in selected countries. ADB will organize regional consultations to cover more countries. Civil society representatives will be invited"*⁴. Accountability mechanisms detailing the responsibilities and obligations of both the ADB and the implementing entity must be clearly spelled out. How will the ADB, in operational terms, remain true and committed to social and environmental safeguards?
- We call on the ADB to adhere to the highest standards of transparency and disclosure. It is a "must" that CSOs are informed that there are mechanisms for consultation at different levels (project, country, and regional). Apart from on-going analytical studies and assessments of

³ This was mentioned by the SPU Team during the SPU Philippine Consultation Workshop in Manila in November 28-29, 2007.

⁴ ADB (2005), *Technical Assistance for Strengthening Country Safeguards Systems*, Project No- 39186, Para. 16. p. 5.

CSS, there is a "series of subregional consultations (Central and West Asia, East Asia, Pacific, South Asia and Southeast Asia, and a separate consultation exclusive to the civil society will also be conducted) involving a broad range of stakeholders (including governments, executing agencies, project-affected persons, civil society, non-government organizations, academe and private sector entities⁵". An enabling environment for CSO participation in the country processes (consultation, implementation including access to information indispensable for free, prior and informed consent) should be ensured.

Mechanisms for disclosure of relevant information aside from the scope of public communications policy should also be in place, with utmost and thoughtful consideration for project-affected people (e.g. country's laws).

B) Framework Approach / Multitranche Financing Facility

- The Framework Approach [Par. 52, Page 20] is the proposed alternative to the current "front-load approach" that requires vital project documents, such as Environmental Impact Assessment (EIA), IP plans, and resettlement plans, to become publicly available as early as the designing stage. However, the framework approach allows detailed designs of the projects or sub-projects to be submitted even without Board approval. Although this is limited to projects under sector lending modality and multi-tranche financial facilities (MFFs), it allows environmental assessments and safeguards plans to be prepared even as late as the project implementation stage.
- Under the MFF scheme, for example, borrowing countries will be provided a loan for a general program or project (with only general details) that will be submitted for Board approval. Eventually, subcomponents/subprojects of the project will be conceptualized that will no longer require Board approval or will no longer go through the stringent process of project approval. This means, specific details of a general program will no longer be submitted to the scrutiny of the Board. (At present, MFF is being implemented by the Bank in DMCs like India, the Philippines, and Indonesia to name a few.)

Therein lies the basic flaw of the framework approach. It is prone to gaps relative to the implementation of ADB's Safeguards standards and requirements. Since the approach is tailored to the specificities of individual projects or subproject components, how would the Bank and borrowing clients ensure that the Safeguards policy will not be violated in the process?

Further, the effectiveness of the framework approach precariously hinges on the willingness of borrowing governments to submit all documentary requirements and conduct the required consultation processes with affected communities prior to project implementation. Given that such specific requirements would no longer be a stringent prerequisite for project approval, we wonder whether these borrowing governments would actually undertake or put all Bank-prescribed requirements in place.

In the case of the infamous Southern Transport Development Project (STDP) in Sri Lanka, it took project proponents several years to develop an EIA only to find out later that more than 70 percent of the project is out of scope as prescribed in the document. Likewise, it took three years to develop a resettlement implementation plan. Such irregularities took place despite the application of the Bank's so-called front-load approach. With borrowing governments given greater flexibility in addressing compliance issues, this could unwittingly result in the violation of ADB's safeguards policy.

- Regarding the proposed gap-filling requirements [Par. 54, Page 20], the SPS does not provide any clear mechanism for implementation. Neither does it clearly indicate the existence of an independent body that would ensure that gaps would be addressed. We urge the Bank to continue to require subprojects/subcomponents to go through the regular process in order to reduce the possibility of gaps in Safeguards implementation. Instead of applying a framework approach, the Bank should put conditionalities in the release of the general fund of a general program to ensure that the Safeguards requirements are complied with.

C) Financial Intermediation

⁵ Minor Changes in Scope and Budget Increase, Strengthening Country Safeguards Systems, Asian Development Bank, March 2007.

- According to the SPS, investments of ADB funds through a financial intermediary (FI) [Par. 42, Page 17] will require the establishment of an environmental and social management system (ESMS). For an FI's investments with minimal or no adverse social or environmental risks, the FI project will be classified under Category C and will no longer need to apply any specific requirements. This is troubling. The ADB does not have direct oversight or strong leverage on subprojects under this type of modality. [Par. 29, Page 10] states that *"ADB does not have direct oversight or strong leverage on subprojects, because subprojects are often unknown when an FI project is appraised and funds are dispersed widely to many subprojects."* Due to several layers of intermediation, it complicates the ability of the Bank and CSOs representing affected communities to monitor each project. For example, the SPS does not clearly mention whether there is mandatory public disclosure of the results of due diligence for investments through financial intermediaries. The risks posed by environmentally sensitive projects are much greater as they can be implemented without the Bank's knowledge. Borrowing countries are also provided a strong leeway to circumvent the stringent provisions of the Safeguards. Ergo, it would be difficult for all relevant stakeholders, particularly CSOs, to make timely and appropriate interventions to prevent negative social and environmental impacts from occurring.

In addition, compliance of FI-projects to Safeguards standards is highly questionable since Safeguard requirements for FIs will be tailored to suit the FIs' specific structure [Par. 55, Page 20]. We urge the Bank not to sacrifice strict Safeguards compliance of borrowers in order to move its portfolio. The ADB should make sure that every dollar it invests benefits the communities, particularly the poor.

- On private sector participation, the ADB continuously covers up private sector or financial intermediary-led projects [Par. 55, Page 20] by allowing FIs to not disclose pertinent data such as EIAs and safeguard plans, among others, before the appraisal stage. These documents are essential to the meaningful and active participation of stakeholders, particularly, those who are deemed most likely to be negatively impacted. Further, the draft is completely silent about the role of public-private partnerships in this process, which is Bank's publicly preferred new way of doing business.

D) Overarching Statements on ADB's Safeguard Commitments

- [Par. 36, Page 13] *"ADB affirms that environmental and social sustainability are prerequisites for economic growth and poverty reduction in Asia and the Pacific."* In our opinion, the statement should clearly reflect and acknowledge "respect for and steady rule of human rights" as a fundamental and intrinsic component in addressing the poverty situation in most DMCs.
- [Par. 37, Page 13] *"... (ii) where avoidance is not feasible, minimize, mitigate, and/or compensate for adverse project impacts on affected people and the environment..."* Sub-paragraph II should be formulated more accurately like this: Where avoidance of negative impact is not feasible, minimize, mitigate, and/or compensate for adverse project impacts on affected people "according to the rate prescribed by national laws of borrowing countries and/or international standards."

Environment Safeguards

- [Principle 2, Sentence 1] In the category of pre-project environmental assessment, dangerous seismic zones should be included into the vulnerable territories because the construction of a project in a seismic zone can lead to potential catastrophic consequences.

[Principle 5, Sentence 2] *"Involve key stakeholders, including project-affected individuals and local NGOs..."* The word "NGOs" should be further qualified as independent and legitimate NGO representatives. Likewise, for purposes of clarity, we deem it necessary for the SPS to give a definition of who constitutes potentially affected people, at the same time, SPS should stipulate a mechanism for information and consultation of APs by referencing the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters⁶: *"The public concerned" means the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental organizations promoting environmental*

⁶ UNECE, *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, [Online:web] Accessed on 23 March 2008, URL: <http://www.unece.org/env/pp/>

protection and meeting any requirements under national law shall be deemed to have an interest."

[Principle 5, Sentence 4] *"Establish a grievance mechanism to receive and facilitate resolution of the affected communities' concerns and grievances about the project's environmental performance."* It is unclear how this kind of grievance mechanism will be linked with the ADB's Accountability Mechanism. How does the Bank exactly propose to operationalize this mechanism in concrete terms? Who will take the lead on this under the proposed CSS approach?

- [Principle 8, Sentence 3] The draft policy recognizes the need to conserve critical habitats and protected areas. However, the third sentence of this principle states: *"If the project has the potential to adversely impact non-critical habitats, proceed if there are no technically and financially feasible alternatives, overall benefits from the project substantially outweigh the environmental costs, and any conversion or degradation is appropriately mitigated."* The SPS should clearly define what it refers to as non-critical habitats, as well as the area of coverage of this.
- [Principle 9, Sentence 3] While we welcome the Bank's non-implementation of projects generating pollutants emissions and discharges, including direct and indirect greenhouse gases emissions, waste generation and release of hazardous materials, the SPS should still explicitly state that the Bank would not fund any project producing greenhouse gases emission. We subscribe to the belief that there is no such thing as clean coal as numerous studies have demonstrated.⁷

[Principle 9, Sentence 4] *"...Avoid the use of hazardous materials subject to international bans or phase-outs..."* We urge the ADB to reject the use of hazardous materials subject to international bans or phase-outs. Whether or not every country from Asia and the Pacific region have joined or adhered to international conventions and agreements, the Bank should support international efforts to effectively manage hazardous waste materials.

Involuntary Resettlement Safeguards

- [Objectives, Sentence 1] *"Enhance or at least restore..."* We suggest this should be reworded as "restore as well as enhance" because displaced people should be treated as project beneficiaries themselves and should never be placed in a "worse off" situation by any ADB-assisted project or program. Most infrastructure projects, such as the STDP in Sri Lanka⁸ have left the affected people landless, losing their livelihoods in the process. Their home gardens and cultivated lands have been destroyed to give way to a major highway. Some of them have been relocated in areas unsuitable to their way of living, and at times lacking in basic social services. Thus, the ADB and the borrowers should be obliged to improve the livelihoods of affected communities by adding this clause "and create development opportunities for involuntary resettled people."
- [Scope, Sentence 1] We recommend that the scope include the following during identification of compensation cost: (i) market value of land or land use right; (ii) market value of landed properties, including fruit trees and perennial plants; (iii) cost of inputs, related to land-reclamation, its exploitation, including its inflation; (iv) all losses of property owner and land user caused by impoundment of land; and (v) lost profit.

Moreover, the scope should put equal importance on physical displacements (loss of residential land, shelter or relocation) and economic displacements as they are not mutually exclusive. Determining the potential negative externalities of an ADB-assisted project should go beyond mere physical displacement/relocation. Social and cultural displacement should also be factored in the equation.

Further, the scope should be clearly inclusive of affected peoples without legal titles.

- [Principle 1, Sentence 1] Compared to the environment principles, the "no project alternative" is completely absent in this section. Failure to mention this is contradictory to the objectives of

⁷ M. Baker and P. Horsman (2005), *Burning Our Future: Coal, Climate Change, and Renewable Energy*, Greenpeace.

⁸ NGO Forum on ADB, *Southern Transport Development Project Updates*, [Online:web] Accessed on 23 March 2008, URL: <http://www.forum-adb.org/Project%20Campaigns/Project-STDP.html#Updates>

involuntary resettlement safeguards and current policy which requires “that involuntary resettlement be avoided where feasible.”

- [Principle 2, Sentence 4] *“Pay particular attention to the needs of vulnerable groups...”* We are troubled by the conspicuous omission of physically-challenged individuals or people with disabilities. There should also be tacit mention of special assistance to this affected sector.

[Principle 2, Sentence 1] *“Carry out free, prior informed consultations with all affected people...”* It is necessary to explicitly state that it is an obligation of both the Bank and the borrower to conduct continuing dialogue with affected and local NGOs during the entire project implementation.

[Principle 2, Sentence 2] *“Inform all affected people of their rights and options...”* It should be stipulated that their consent for fair and just compensation is also needed.

- [Principle 3, Sentence 1] *“Improve or at least restore livelihoods of all affected households through...”* This sentence should include a clear discussion on agriculture lands that will be used and eventually degraded for infrastructure projects. These lands should be compensated according to the prevailing market value. In the same sentence, fourth clause, the term “where feasible” should be dropped as this considerably reduces the degree of protection that should be accorded to displaced communities. It gives opportunity for the project implementers to circumvent this provision.

In addition, we find it necessary for the SPS to include provisions that show that damages inflicted on affected people should be estimated in accordance with the market prices existing at the time of compensation. For example, in Azerbaijan (per the resolution of the Cabinet of the Ministries) land price is calculated according to the Land Cadastre. However, houses, farms and trees are valued according to the Cabinet of the Ministries’ resolution #110 (since 1999 the price has appreciated to 10-15 times) .

[Principle 3, Sentence 2] We suggest the following provisions be added: As for physical displacement, owners should be resettled in areas with better social infrastructure; the same should receive compensation for land properties based on their ability to purchase properties that are equal in value. Affected people should be given their rightful choice to avail of either resettlement or pecuniary compensation.

[Principle 3, Sentence 3] *“...Improve the standards of living of vulnerable groups ...”* It would be better to include this clause: “in terms of housing, livelihoods and social inclusion.”

Regarding matters pertaining to full transparency and anti-corruption related to the evaluation of compensation for affected peoples, the SPS should require the borrower to use independent adjuster’s (valuer) services by conducting tenders. The final decision on compensation-related issues should be done with the full participation of independent NGOs, ADB representatives, municipal representatives and affected people.

- [Principle 6, Sentence 3] The SPS should require all resettlement plans to carry the tacit consent and full agreement of affected people.
- [Principle 9, Sentence 1] This should be reworded as: No project completion report should be released until all outstanding livelihood and economic restoration cases have been completed and resolved. Project closure should be predicated by satisfactory restoration and the enhancement of the socio-economic aspects of the affected peoples’ lives.

Regarding completion reports that assess outcomes of resettlement: in order to come up with a non-biased result, preparation of the report should be participative. Representatives from the local communities should be allowed to participate in the preparation and finalization of the report to ensure robust outcomes and authentic results. Submission and disclosure of said reports should be made mandatory to attest that the results of the report are conclusive and reliable.

Indigenous Peoples Safeguards

- [Objectives, Sentence 1] In light of last year’s adoption of the UN General Assembly of the Declaration on the Rights of Indigenous Peoples, it is imperative that the paramount provisions

of this declaration be incorporated into the SPS draft. Article 10 states that "*Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.*" Project-related resettlement processes that do not acquire the full consent of Indigenous Peoples should be stopped.

We believe the objectives should include provisions as follows: (i) preserve at all costs the cognate ties of voluntary resettled IPs; and (ii) respect the right of IPs to self-determination in terms of setting their own development priorities; the right to participate in the preparation, implementation and evaluation stages of projects and programs; the right to preserve own traditions and institutes; right over natural resources that are their primary means of subsistence; and rights to land and property.

- [Principle 2, Sentence 1] We demand that the Bank drop the term free prior informed consultation in favor of free prior informed consent. While the ADB's existing IP policy (page 7, Policy on IP, 1998) recognizes the right of the IPs to free, prior informed consent in terms of development initiatives, the draft policy completely fails to recognize this right. Likewise, the draft policy should explicitly refer to international agreements and covenants such as the UN Declaration on the Rights of IPs. They have the right to self-determination. They should be consulted at all times and their free prior informed consent should always be obtained in terms of development or utilization of their ancestral lands. Moreover, their attendance to Bank-initiated consultations or meetings concerning projects or programs should not be misconstrued for their consent and agreement. Moreover, it would be presumptuous if not illogical for the Bank or the borrower to interpret their presence in consultations as expression/indication of their full support of ADB development intervention. Project proponents should make sure that IPs are requested to attend ADB or borrower-initiated consultations.
- [Principle 3, Sentence 1] The Bank should not be contented with merely ascertaining IPs' broad support for a certain project. "Broad" is a dangerous term that is open to different interpretations (taking for example the Phulbari Coal Mine Project case)⁹. The Bank should instead ascertain IPs' free, prior informed consent for a certain project. Broad support could also pose a problem for the marginalized groups in certain IP communities that continuously oppose ADB-assisted operations. Likewise, an independent body, composed of all stakeholders (representatives from the Bank, government, CSOs and IP communities) should be established to ensure that IPs have given their free prior informed consent to an ADB project or program.
- [Principle 9, Sentence 1] The draft policy only requires the preparation of completion reports that assesses the outcome of IPP. However, in order to come up with a non-biased result, preparation of the report should be made participative. Representatives from IP communities should be allowed to participate in the preparation and finalization of the report to ensure genuine results. Submission and disclosure of said reports should be made mandatory to attest that the results of the report are conclusive and reliable

E) Screening and Scoping

- "*ADB will carry out screening at the earliest stage of project preparation when sufficient information is available for this purpose. Screening is undertaken to (i) determine the significance of potential impacts or risks that a project might present; (ii) identify the level of assessment and institutional resources required for the safeguard measures; and (iii) determine disclosure requirements*" [Par. 41, Page 17]. First, ADB must clearly mention the time line of the screening of the project. By merely stating at the earliest stage of project preparation robs affected community of opportunities to prepare well in their interaction with the ones responsible for screening and scoping work. We expect ADB to be proactive with their information dissemination through the timely web-posting of all relevant requirements related to the screening of the project as well as solicitation for public comments on the project before the project preparation stage. ADB must put in place a mechanism or process that would effectively carry out proper consultations with affected peoples and other relevant stakeholders.

⁹ Letter sent by community members of Phulbari, Phulbari, Birampur, Nababganj and Parbatipur *upazillas* (subdistricts) in Bangladesh to the ADB Board and Management on December 15, 2007. [Online:web] Accessed on 24 March 2008, URL: <http://www.forum-adb.org/pdf/PDF-Phulbari/CommunityLetter%20English.pdf>

F) 120-Day Disclosure Period

- [Par. 45, Page 18] The mandatory provision for “120-day” disclosure of environmental assessments before appraisal is completely missing in this section. There should be explicit mention of a time frame required mandatory disclosure of such documents, including environmental management plans, IP and resettlement plans, in a language and manner that are accessible to affected people. A fixed period of time should be set, in this case at least 120 days, for the disclosure of documents to give local community members ample time to fully understand/ appreciate and provide their inputs/comments on the said documents. We find no merit at all in the attempt to reduce the number of days for disclosure of these important documents. We find that even four months can be insufficient to make an informed assessment of the real and anticipated environmental and social impacts along with the implications of ADB operations. Borrowers should be mandated to provide such reports and documents to the lowest governance structure through publicly accessible places to ensure access to information for affected communities and concerned stakeholders. Apart from the internet, which will be a huge challenge for people without access to or with limited access to the internet, ADB should consider tapping other media entities for information disclosure.

Regarding the list of information to be disclosed by the ADB and the borrower, we believe it is necessary to disclose information on all the projects irrespective of whether they have big impacts or not. Timeframe of information disclosure should be worked out.

G) Consultation and Participation

- [Par. 46, Page 18] Public consultations should reference the Aarhus Convention, which provides for the public’s effective participation in the decision-making process, with each participant given the opportunity to express his or her opinion. Specifically, the convention grants the public rights and imposes on parties and public authorities obligations regarding access to information and public participation and access to justice. Relative to this, ADB’s public information processes and procedures should be guided by the willingness of the both the Bank and the borrower to listen to, consider and respect the opinions and views of key stakeholders like the affected communities and CSOs. For instance, the involvement of environmental NGOs that can provide independent judgment and assessment should be ensured from the very beginning of a project’s environmental assessment.

In addition, this section should state clearly that consultation is required in every stage for projects with significant environmental and IR issues to make certain that mandatory safeguards provisions are put in place. In the spirit of participatory governance, IPs should be involved up to the monitoring and evaluation stage of the project in order to determine whether or not project benefits have reached the right beneficiaries.

H) Roles and Responsibilities of ADB and Clients

- [Par. 61, Page 23] We urge the Bank to revise this section and adopt this line: “In case the borrowing government does not comply with the Bank’s Safeguards, the Bank is required resort to the legal remedies.” The SPS should stipulate at what stage legal sanctions can be applied. The Bank should never give any opening for borrowers or clients to violate the very policies that are supposed to protect the fundamental rights of the affected. Neither should it tolerate irresponsible actions from its borrowers. The ADB should find out whether it is guilty of aiding, whether knowingly or unknowingly, non-compliance of its own policies.

I) Resources Implications

- [Par. 64, Page 24] It is disappointing that the problem of lack of Safeguards specialists in the Bank as singled out in the evaluation study of the Operations Evaluation Department¹⁰ was downplayed in the draft SPS. The dearth of specialists in a 2,000-strong development institution, shocking as it is, could be the main reason behind a number of safeguard violations and non-compliance that has plagued a number of ADB-assisted projects and programs.¹¹ It is long-overdue for the Bank to upgrade its capacity and expertise on this front by augmenting its

¹⁰ ADB (2006), *Special Evaluation Study of Environmental Safeguards*, Operation Evaluation Department (OED), ADB: Manila.

¹¹ H. Thakkar et. al (2006)., “Untold Realities: How the ADB Safeguards Have Been Violated in Bangladesh, India, Lao PDR and Pakistan,” NGO Forum on ADB, Manila.

roster of Safeguards specialists, and undertaking intensive training of borrowers on Safeguards implementation and compliance.

We thank you for extending the period for public commenting on the Safeguards Policy Statement draft. We hope that the Safeguards Policy Update team would take into consideration the issues and concerns that we have stressed anew in this paper and which have been taken up by our network partners and members in previous submissions. We look forward to seeing our comments and recommendations incorporated in the Safeguards matrix that the SPU Team has committed to during the regional SPU consultations in Central Asia and the Philippines.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Hemantha Withanage', written over a horizontal line.

Hemantha Withanage
Executive Director