

Safeguarding Safeguards

Comments on the Operations Evaluation Department (OED) Study of ADB's Environmental Safeguards¹

The Asian Development Bank's consolidated review of its three safeguard policies on Environment, Involuntary Resettlement and Indigenous Peoples has raised doubts and apprehension among civil society organizations (CSOs) since it was announced in July 2005. The critical reaction is not baseless, given the bad experience of the CSOs with their 2004 engagement with the International Financial Corporation, which still ended in the "watering down" of the latter's safeguard standards.

However, we at the NGO Forum on ADB welcome and acknowledge the Bank's implementation evaluation of its Environment Policy in response to the request and clamor of CSOs. Further, we would like to articulate our position on some of the salient findings and critical points raised by the OED Special Evaluation Study (SES).

According to the SES, *"ADB's recent client-oriented initiatives, including consultations in the context of the Middle Income Countries and Ordinary Capital Resources Country Partnership, and the Innovation and Efficiency Initiative, have highlighted the desire of some of ADB's major client countries to introduce procedural flexibility in the application of safeguard policies and to increase country ownership/capacity in delivering safeguard outcomes."*² This statement seems to reflect the prime motivation of the Bank in updating its safeguard policies. The Bank is apparently more concerned about making its lending business more attractive to its major clients than actually consolidating or clarifying the role of its safeguard policies in the context of its development initiatives and interventions. Unsurprisingly, the countries that favor flexible safeguard standards are the Bank's two biggest borrowers--India and China--which receive about 45 percent of its lending portfolio.

Over the years, the World Bank, International Monetary Fund and the ADB have successfully imposed its neo-liberal ideologies through its conditionalities in most developing countries of Asia and the Pacific. These multilateral development banks have, for the most part, heavily influenced or dictated the development-oriented decisions (including those related to the environment) of their borrowing countries through economic policies/programs that are coated as "poverty alleviation." Deregulation, privatization and structural adjustments are some of their economic interventions that have received public criticism.

In a similar vein, the Bank has introduced new approaches such as "harmonization" and "country systems" to the review of its safeguard policies, which make concerned stakeholders quite uneasy. Apropos to this, the Special Evaluation Study (SES) of the Operation Evaluation Department (OED) of the ADB has strongly proposed these concepts to be included in the ADB safeguard policies and procedures under the consolidated review.

The key findings reported in the SES are:

- the "one size fits all" approach is not effective, failing to add value in many cases;
- there is an overemphasis on procedural compliance and not enough attention paid to results delivery;
- there is a perverse incentive for ADB lending decisions to be actively directed to avoid financing projects that might trigger environmental procedures;
- environmental safeguards and environmental enhancement are two sides of the same coin, and one should not be overemphasized at the expense of the other;
- "mainstreaming" but also "marginalizing" environmental specialists; and
- poor technical quality of environmental impact assessments.

¹ Asian Development Bank, Operation Evaluation Department, Special Evaluation Study- Environmental Safeguards- September 2006 Reference No: SST:REG 2006-13

² Ibid Page1 Para 2

The recommendations of the OED include:

- review of the 2002 Environment Policy and potential refinement; strengthening organizational effectiveness;
- improving the quality of ADB's environmental assessment process and lowering transaction costs to make it more cost-effective;
- improving the partnership with NGOs and civil organizations on environment;
- moving toward adoption of improved country systems and harmonization with other development partners in selected Developing Member Countries (DMCs); and
- preparing an implementation plan for the revised Environmental Policy.

We find merit in some of the SES findings. The recommendations, meanwhile, have pros and cons that need to be carefully analyzed not only from the decision maker's standpoint but also from the public's viewpoint.

Why are we interested about ADB safeguard policies?

While ADB's existing safeguard provisions are not the best in the world, in principle, they provide some protection to the "project-affected communities" and "project-impacted natural resources." However, based on well-documented and highly-problematic ADB-funded projects in the past, these safeguard policies have for the most part proven to be good on paper only. The crux of the problem continues to lie on the unsuccessful implementation of these policies by the borrowing countries, the implementing agencies, the co-financiers, or even by the Bank itself.

Although, some countries like India and Sri Lanka have good environmental standards, regulations, policies and procedures, many DMCs do not have internationally-accepted standards. While some countries may have better environmental standards, these are hampered by failed enforcement due to bad governance, inept justice system, systemic corruption, etc. Most alarming are those countries with limited democratic space and curtailed human rights. Obviously, the concerned citizens and affected communities of these countries cannot freely express their sentiments against ill-conceived and badly-implemented projects.

Given these serious realities, it is important to adopt and effect strong ADB safeguard policies for third party monitoring and involvement. The policies should ensure equal standards and mechanism across the developing member nations, particularly in transboundary projects. If the ADB continues to provide project and policy finance to DMCs, it cannot just play the "lender role." The Bank has to take prime responsibility to what its development money, whether good or bad, is doing to its member countries. In view of these, it should not come as a surprise to the ADB, if the CSOs take a cautious approach to the so-called consolidated review.

The ADB's Environment Policy contains five main elements: (i) promoting environment and natural resource management interventions to reduce poverty directly, (ii) assisting developing member countries (DMCs) to mainstream environmental considerations in economic growth, (iii) helping maintain global and regional life support systems that underpin future development prospects, (iv) building partnerships to maximize the impact of ADB lending and non-lending activities, and (v) integrating environmental considerations across all ADB operations.³ However, the ADB cannot claim any success in these elements other than the consideration of environmental safeguards in some of its project lending. Our ground experiences documented in the recent NGO Forum publication, "Development Debacles",⁴ clearly shows that the ADB has even failed to properly adhere/comply with the procedures of its own policy.

Integrating vs. Consolidation

As originally presented, the ADB safeguard policies was about consolidating the three policies. The Bank has repeatedly stressed that no basic policy principles will be touched in the consolidated review. It is adopting a "box ticking" approach to make sure that all safeguard provisions are properly considered in project funding. In this regard, SES recommends the integration of the three policies.

³ Environment Policy(2002)

⁴ NGO Forum on ADB, Development Debacles, September 2006

SES states that *“the emphasis on sustainable development in the 2002 Environment Policy suggests an integration of environmental and social safeguards and enhancement. There are advantages to integrating the three policies, even though there could be some disadvantages as well.”* Moreover, the report also suggests that *“the policy review should further explore the pros and cons of the integration.”*

The last recommendation should have clearly identified the pros and cons of the policy integration. Moreover, if one of the advantages would be predicated on ADB's available (or limited) resources, then policy integration should not be done at the cost of human, social and environmental rights of the affected communities. Ergo, the Bank should make internal efforts to improve its resources vis-à-vis the implementation of these policies.

Defining safeguards

The SES states that *“within ADB, the ‘Environment Policy’ has often been referred to as the ‘Environmental Safeguard Policy’ and ‘Environmental Safeguards’ have sometimes become synonymous with “avoiding environmental harm.”* This reflects the motivation and expectations of ADB staff.⁵

This statement calls for a need to clearly define “safeguard” in the context of ADB operations. While the World Bank has a number of other safeguard policies, the ADB has only three. However, the Bank's other policies such as water, forest, gender, and social protection also contain safeguards provisions. So this could be a good time for the Bank to rethink the real meaning of safeguard policies, what they encompass and how to best implement them.

However, we view the proposal for reconsidering *“refocusing efforts—from front-end loan processing and approval to a balance between loan processing and monitoring, implementation, and results delivery, and from “safeguards” to “environmental enhancement,”*⁶ as a dilution of the environmental safeguards. Safeguards and enhancement are two different matters and should not be used interchangeably. We urge the Bank to give utmost priority to protecting and preserving the natural environment of its project sites in any way possible.

“One size fits all” or “Small to Extra Large”

Application of “uniform procedures to all countries” has been strongly criticized in the OED report. It is highly understandable that many countries lack the necessary resources and expertise to meet higher yet “costly” environmental standards.

On the other hand, every person has the right to “equal environmental standards.” We feel that the proposal of the OED to make three categories of countries according to the available national procedure, which are:

- (i) countries with well developed systems that embody most of the objectives and principles of ADB's policies and with a reasonable track record in implementation,
- (ii) countries with semi-developed legal/institutional/policy frameworks and some capacities for environmental safeguards but all requiring substantial strengthening, and
- (iii) countries with weak systems and capacities,⁷

runs counter to equal environmental rights of people living in countries with weak systems and capacities, as well as countries with limited democratic space.

Harmonization or watering down

The OED statement, *“Any move towards adopting country systems should not be achieved through watering down ADB's current environmental safeguard standards”* is commendable.

But whether this is practically possible is another question. One example is the Southern Transport Development Project (STDP) in Sri Lanka as proven by the findings of the Compliance Review Panel. Although there is still no harmonization of environmental safeguards between the ADB and its co-

⁵ Ibid Page VII- Executive Summary

⁶ Ibid Page viii- Executive Summary

⁷ Ibid Page IX- Evaluation Study- Environment Safeguard

financier, JBIC, the latter is still bound by the ADB's Environmental Policy. However, when project-related problems began cropping up, JBIC insisted that it should only be governed by its own environment policy and not by the ADB's policy.

This experience may show that harmonization can reduce transaction costs but only in terms of financial management and procurement. Harmonization of environmental assessment - which is implemented in the form of country systems - is another thing. It could actually increase costs for the ADB and the borrower in the short run. (The Bank needs to sink a lot of resources into the equivalence assessment, while the country needs to borrow or invest resources into building capacity.)

Further, the bureaucratic hurdles among IFIs and local agencies do not provide the appropriate environment for such harmonization. Therefore, we believe that while harmonization of policies can have positive effects, it is not applicable to social and environmental safeguards.

Country Systems

Moving to the "Country Systems" is one of the main recommendations of the evaluation. While justification for the OED sample selection (i.e. India, China, Vietnam and the Philippines) is acceptable, we believe that it does not represent a cross section of the DMCs in terms of diverse or conflicting regulations, procedures and governance mechanisms. Certain DMCs, specifically in Central Asia, do not allow public consultation, much less, the involvement of NGOs. In such countries, the critical roles of the civil society and affected communities in the Environment Impact Assessment (EIA) process are practically non-existent.

The SES study shows that while PRC has 43 Category A projects out of the total 58, India has only one project out of 46. This is clearly indicative of the availability of (or the lack of) "democratic space" for public participation. In fact, the report accepts that China's public consultation process is the weakest among the sample countries.

Meanwhile, the SES states that *"the quality of the Summary Initial Environment Examinations (SIEEs) is generally lower and more variable across countries and sectors. For example, for Loan 1944 and Loan 1959, two Category B road projects in India cited, the SIEE reports were barely three pages long and that no Environmental Management Plan (EMP) was even included. This occurred despite the fact that all the governments concerned require an EMP for all projects. In comparison, Loan 2152-IND, a power transmission project in India, was supported by an 18-page SIEE that contained a detailed assessment of the potential environmental impact and a detailed EMP. This inconsistency in the quality of SIEEs seemed to be related to the environmental awareness of ADB Appraisal Mission Leaders. Some documents were so poor that it is doubtful they should have been accepted. In the case of the Philippines and Viet Nam, similar inconsistency also exists and also reflects the capacity of the Executing Agencies and whether ADB provided assistance in preparing the SIEEs."*⁸ The SES should clarify whether much of the blame should go to the national government or to the ADB. What can be gleaned from this specific finding, however, is that the ADB has problems with regard to the expertise of its own staff.

The SES states that *"of the six Category A projects examined, 100 percent of the EIAs were prepared by the DMC agencies."*⁹ This is not a surprise since many countries have adopted EIA requirement before the ADB. They have developed expertise too.

However, this finding does not jibe with the SES statement that *"the quality of environmental assessments was found to be inconsistent and often did not reflect current international good practice."*¹⁰ The real problem lies on the quality control of the documents, as well as in the proper implementation of the EIA. We feel that the availability of EIA expertise at the DMC level cannot be a justification for giving full control of the entire process to the borrowing countries.

On the other hand, we agree to this SES statement: *"that the application of the country systems does not mean that ADB will pass all the responsibilities with respect to environmental assessment and monitoring to DMCs. Rather, the goal is to achieve ADB's policy objectives through greater use of*

⁸ Ibid Page 39 Para 124

⁹ Ibid Page V- Executive Summary

¹⁰ Ibid Page VII- Executive Summary

national systems and resources. ADB should help improve deficiencies in the country systems where they exist.”¹¹

But we take exception to this statement: *“Some multinational companies, including both Shell and British Petroleum (BP), have established useful precedents on how better integration of international and national systems can be achieved. Both companies have strong corporate policies that recognize the need to adopt national systems and standards, but also apply an overarching reliance on the World Bank system as the corporate requirement.”* It clues as in on a disturbing facet of the so-called “Country Systems”, which will not only harmonize the safeguard policies of donors, but will also include those of multinational companies that follow different standards in different countries.

We see “systemic corruption” as a major risk in introducing the Country Systems. Another potential cause for alarm under this approach is that the EIA system would be rendered susceptible to “rigging” and “manipulation” from bureaucrats and/or politicians wanting to justify the badly-conceived development projects of their government. This is due to EIA consultants would have difficulty giving an “independent, objective view” in most countries under a country system. Meanwhile, “accreditation” and “de-accreditation” of EIA consultants do not exist in most countries. In such an environment, compliance to safeguard policies would be a major risk.

Avoiding sensitive projects

The SES states that *“despite some positive impacts, ADB has not maximized its potential for value addition to client countries such as India, where ADB funding decisions have sought to avoid including environmentally sensitive subprojects in its sector loans. In these cases, ADB has avoided opportunities to play a “demonstration” role.”¹²* The same report reveals that the ADB has no adequate capacity in other countries. The over-all quality of the reports is also weak according to the SES.

We acknowledge that avoiding very sensitive project (if mitigation is not possible) is an acceptable practice be it on a national or international level. However, we would like to argue that in financing non-sensitive parts of a project and allowing the national governments to use their own funds or borrow from the other donors, the ADB is shrewdly sidestepping possible criticisms and controversies that have hounded many of its projects in the past. We view the Bank’s attempt on “self-preservation” as a way to wash its hands off any potential harm/disaster that may directly or indirectly result from a project it funds or supports.

Similarly, the Forum has monitored a number of ADB projects that have created irreparable environmental disasters over the years. These could have been avoided if the ADB has properly incorporated the Country Environmental Analysis (CEA) in its Country Strategy Program (CSP). And the SES somewhat echoes our position, stating that *“despite the resources spent on preparing CEAs, their impact on CSPs appears to be limited to date. There is a risk that CEAs will become another “box ticking” exercise required for the preparation of CSPs.”*

Who makes environmental decisions?

We find it alarming that out of the 123 respondents surveyed inside the ADB, only 13 have environment background (while 56 and 38 respondents, respectively, have economic and engineering backgrounds). We believe these respondents are the key decision makers in ADB projects. The answer to the weak implementation of the Bank’s environmental policy most likely hinges here. On the other hand, the SES acknowledges the fact that among the more than 2,000 staff members¹³ of the ADB, there are only 17 safeguard specialists. Likewise, only 14 percent of the AMLs have received any environmental training. The ADB cannot be excused for giving little attention and less consideration to putting in place qualified and better equipped staff to oversee the implementation of environmental safeguards in ADB-supported projects. These revealing data gives us the impression that the Bank’s focus is primarily policing compliance to EIA requirements. Enough or significant participation in the other stages of the project cycle seems to be less of a priority.

Beware of Accountability Mechanism

¹¹ Page 64 Para 204

¹² Page 40 Para 128

¹³ Back Cover ADB PCP Policy document 2005

OED's attempt to warn the Staff about the Bank's Accountability Mechanism can be seen as an unnecessary pressure on the mechanism itself. This could have serious repercussions on the Bank's transparency and accountability in the future. The SES states: *"Alternative consequences may include an increasing number of projects being subjected to the compliance mechanism and a growing view among civil society that in some cases ADB does not adequately identify and mitigate environmental risks and impacts. All these will increase reputational, if not legal, risks to ADB if the policy and procedural requirements for environmental safeguards and resource allocation, both financial and staff, are not aligned."*¹⁴

The figures are quite telling. Only one out of the seven cases referred to the Office of the Special Project Facilitator was settled. The other six were denied in the last two years. Meanwhile, the CRP received only two complaints since 2004. It is hard to understand why the OED has to make somewhat of a veiled threat, when the Accountability Mechanism is already under fire due to lack of acceptance among the civil society.

120-day rule

Public consultation is the most important and value added aspect of the EIA process. Among the countries surveyed, China has the weakest public consultation process. There are other DMCs in Central Asia that have weak consultation processes. However, we find this statement: *"while public participation has always been considered a weak link in the PRC environmental safeguard system, the Guidelines have brought the PRC system one step closer to international best practices,"*¹⁵ questionable because public consultation does not simply exist there. Likewise, we find it hard to believe China's consultation process would improve even under the "Country Systems" for obvious political and governance reasons.

Most countries provide 30-60 days for public consultation and ADB provides an additional 120 days to the consultation process. The SES' suggestion to reduce the 120-day period to 60 days would not be a serious reduction provided the DMCs still provide separate 30-60 days. However, there will only be "one consultation period" under the harmonization approach, which we deem totally unacceptable. In such a situation, 60 days would not be adequate due to the following reasons: (i) The EIA documents are very technical for local people to understand; and (ii) in most cases, local translation is delayed or not available at the countryside.

Setting the benchmark before accreditation

Accreditation of safeguard systems seems to be a good proposal. However, quality control is a complex issue. (We hope that the ADB is not suggesting something similar to the ISO standards.) The SES accepts that ADB's own practice is below the international best practices. The report states: *"However, the SES found a number of areas where current practice in ADB is falling below international best practice and reasonable expectations. Deficiencies are evident at each key stage of the process—categorization, scoping, assessment, and implementation. The main causes are lack of resources, lack of a clear focus, poor integration with national systems (particularly regarding timing), and reliance on qualitative assessment methods."* This finding is completely not acceptable for an Institution that has over six billion in annual lending portfolio. Therefore, we urge the Bank to correct its in-house problems first before setting accreditation standards for the national systems. Otherwise, the ADB would not be able to set the benchmark for best practices vis-à-vis environmental safeguards.

Dropping B sensitive

The OED is in a dilemma as to whether the ADB follows the correct categorization of environmentally sensitive projects, as there is no such globally-accepted procedure at the moment. However, we agree with the SES statement: *"In other cases, B sensitive, instead of category A, is used for those rehabilitation projects with more sensitive environmental issues. A more prudent approach to assigning environmental category would be to presume the higher category if there is genuine uncertainty on the environmental impacts associated with a project."*¹⁶

¹⁴ SES Page X- Evaluation Study- Environmental Safeguards

¹⁵ Ibid Page 14 Para 52

¹⁶ Page 29 Para 91

We are appalled by this SES specific finding: *“The real issue is that decisions on environmental categorization appear to be lowering the categories to circumvent the safeguard procedures.”*¹⁷ This is one clear indication that the Bank is not playing a clean role when it comes to the categorization of sensitive projects. Therefore, we would welcome the OED proposal dropping B sensitive category projects provided that there is no “whitewashing” of whatsoever as stated in the report.

Third party monitoring or participatory monitoring

The SES reveals that project monitoring is lacking in most sensitive projects. This is not a new issue. NGOs have brought this to the attention of the ADB management in a number of projects for many years. The solution suggested by the SES is bringing in third party monitoring that includes NGOs. Again, the issue of quality control as well as accreditation relative to CSO monitoring is crucial for the Bank to satisfactorily address.

We think it is not a good idea to bring in outsiders for monitoring if they have not been involved in the project design. We recommend that a monitoring team include the local people and local CSOs at the very beginning of the project design stage. All concerned stakeholders and actors should agree on a mechanism that will closely monitor the implementation of the safeguard policies.

We should also consider the situation in India under its new EIA notification. The SES has cited several issues: *“The notification prevents people who are not local residents from participating in public hearings, thereby eliminating the possibility of participation by public interest organizations, public interest scientists and engineers, professionals and advisors to communities in public hearings. The notification also provides for the cancellation of public hearings if local conditions are not perceived as conducive for a free and fair public hearing. Oftentimes, such vitiated conditions are orchestrated by the project promoter and the State Government or district administration who wishes to keep the public from attending the public hearings. The Notification gives district administration and regulators unwarranted discretion in calling off public hearings, even while orchestrating the conditions to justify their cancellation.”*¹⁸ This could be seen as paving the road for the upcoming “Country Systems”. The current public consultation is an “opportunity” rather than a practice to develop the projects from design. Again, we would like to stress that countries such as Vietnam and China, and some in Central Asia have unacceptable public consultation processes. The question is whether the “Country Systems Approach” will improve public participation if the system in governance is not changed.

Conclusion

We strongly urge the Bank to consider the following recommendations in relation to the Special Evaluation Study on the Environment Safeguards, and specifically, to the ongoing Safeguard Policies Update:

Adopting the Country Systems Approach could improve the countries’ capacities, centralizing decision making, which is positive from the angle of the sovereign rights of the nations that might also reduce conditionalities coming from the Bank.

However, while Country Systems Approach can work in few ADB DMCs, it could cause serious implications in most countries. It is hard to believe that it could improve the quality of the implementation of the safeguards, improve public consultation, or solve procedural implications. It can be seen more as a “passing the buck” by the Bank regarding its compliance to the safeguards. It can be justified as a mechanism to reduce the risk of the ADB being criticized for its lending. The risks could include poor quality assurance and possible worsening levels of corruption.

The establishment of a “quality Country Systems” could be an unaffordable conditionality for many countries in the region. The “Country Systems” can be considered as providing “unequal social and environmental safeguards standards” for the people across the region based on the affordability and capability of the different countries. If a country cannot afford or does not want to provide “acceptable safeguard standards,” communities will not have a mechanism to ensure that they relish such standards. Therefore, country systems can be seen as a “double edged sword.”

¹⁷ Ibid

¹⁸ Undoing India’s Environmental Regulation -Bureaucrats and World Bank Note prepared by Madhumita Dutta and Nityanand Jayaraman(unpublished)

Revealing the “bitter truth” of the ADB’s capacity and quality of its safeguard expertise and its role as a leading institution in the region is a remarkable approach of the report. While this provides a momentum for the ADB to revisit its own capability and its role, it cannot be excused for some of its failures as a public institution. Although the ADB may deny some of these findings as baseless or untrue, we hope that the ADB will take some of these criticisms seriously and make necessary reforms.

The report shows that the ADB does not provide any benchmark for safeguard standards. Such an Institution cannot provide any positive development in the safeguard standards before the Bank improves its own capacity. Therefore, while the need of strengthening ADB’s role for capacity-building at the country level is acceptable, it is better to strengthen its existing compliance and its monitoring role rather than “passing the buck” to the countries.

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