Draft for Consultation

March 2022
I. INTRODUCTION

1. The Asian Development Bank (ADB) is undertaking a comprehensive review and update of its Safeguard Policy Statement, 2009 (SPS). The update process has been initiated by ADB Management following a corporate evaluation of the SPS by ADB’s Independent Evaluation Department (IED), completed in May 2020 (IED Report). The update will build off the findings and recommendations of the IED Report, which ADB Management endorsed. The update will seek to modernize the policy, considering the changing development context and evolving developing member country (DMC) and client needs and capacities; as well as opportunities for greater harmonization with the policy principles and standards of other multilateral financial institutions (MFI). The update will consider the diversity of ADB lending modalities and operations, including the private sector, as well as requirements for different contexts such as fragile and conflict affected situations (FCAS), small island developing states (SIDS) and emergency assistance. Overall, the policy update will seek to strengthen safeguard implementation effectiveness and efficiency, in ways that will enhance beneficial safeguards outcomes for the environment and affected people.

2. The revised safeguard policy is expected for ADB Board for consideration in March 2023, following a process of further review, policy development and meaningful stakeholder engagement. To inform this process, ADB is undertaking a series of brief analytical studies. The studies will benchmark ADB’s current SPS against the policies of selected MFI and briefly consider implementation experience. Stakeholder engagement and consultation will have three main phases: (i) preliminary information and outreach on the overall approach for the policy update and stakeholder engagement plan; (ii) consultation on the analytical studies; and (iii) consultation on the draft policy paper. There will be multiple opportunities for stakeholder engagement, including regional consultations; “deep dive” sessions with ADB developing member countries (DMCs) and civil society organizations (CSOs); focus groups on specific topics; and consultations with people affected by ADB projects. This document provides a summary of ADB experience with strengthening and use of country safeguards systems (CSS).

II. METHODOLOGY

3. Objective. This consultation draft has three objectives to: (i) provide a broad comparison of the requirements of other multilateral financial institutions (MFI) for using CSS; (ii) review ADB’s current safeguard policy framework and document

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3 The studies are intended to complement the evaluation completed by IED in May 2020 and will not duplicate IEDs work on the overall effectiveness of the SPS.
4 Please refer to the ADB website and Stakeholder Engagement Plan for further details. https://www.adb.org/who-we-are/safeguards/safeguard-policy-review
experience and challenges with using CSS; and (iii) suggest next steps for the evolution of ADB’s use of CSS.

4. **Methodology.** ADB’s current practices and experience supporting the use of CSS has been reviewed and documented. This included experiences from activities implemented through technical assistance focused on CSS. In addition, a desk review was undertaken to compare how selected MFI safeguards frameworks address the use of CSS. The study considered five MFIs in addition to ADB including: Asian Infrastructure Investment Bank (AIIB), European Bank for Reconstruction and Development (EBRD), International Finance Corporation (IFC), Inter-American Development Bank (IDB) and the World Bank (WB). These were selected given that their business models are similar to ADB, with a mixture of sovereign and non-sovereign lending and the fact that each of these MFIs has updated its safeguard policy since the SPS was adopted in 2009.

III. STRENGTHENING AND USE OF COUNTRY SAFEGUARD SYSTEMS


5. ADB’s SPS was approved by the Board of Directors in July 2009 and came into effect in January 2010. The SPS has the overarching objective to avoid, minimize, mitigate, and/or compensate for adverse project impacts on the environment and affected people; and help borrowers strengthen country systems and capacity. The SPS consolidated three previous policies covering involuntary resettlement (from 1995), Indigenous Peoples (from 1998) and environment (2002), into one policy framework, with separate policy principles and borrower requirements for each of the three areas. The SPS also includes additional requirements that cover all of ADB’s various financing modalities, as well as requirements for the assessment and potential use of country safeguard systems for ADB projects.

6. As defined in the SPS, CSS are a country’s legal and institutional framework, consisting of its national, subnational, or sectoral implementing institutions and relevant laws, regulations, rules, and procedures that pertain to the policy areas of environmental and social safeguards. The SPS specifies that ADB may consider applying a borrower’s CSS at the national, subnational, sector, or agency level provided that the legal framework of the CSS is equivalent to ADB’s SPS and that the borrower has the acceptable implementation practice, track record, capacity, and commitment to implement the legal framework. ADB is responsible for conducting the equivalence and acceptability assessments. The borrower is responsible for achieving equivalence and for maintaining acceptable implementation capacity and practices. This is done on the basis of an action plan agreed between ADB and the governmental entity for which equivalence and acceptability assessments are conducted. A country, sector, or agency may qualify for a CSS approach for one, two, or all three safeguard areas depending on the result of the CSS assessments. ADB does not allow the use of CSS in projects that are highly complex or sensitive. When ADB’s Board approves a project that uses CSS, ADB supervision follows the same procedures as for any other ADB-financed project. The use of CSS does not alter the role of ADB’s accountability mechanism.

7. As a policy objective, the SPS emphasizes ADB’s commitment to assist its DMCs to strengthen their own safeguards systems and enhance their implementation capacity
to address environmental and social safeguards issues. Since adopting the SPS, ADB has carried out more than two dozen technical assistance projects (TA) to build capacity for safeguards in 36 DMCs and two TAs that focused on the use of CSS.

B. Other MFI Policies on Use of Country or Borrower Safeguards Systems

8. In addition to ADB, three other MFIs explicitly enable the use of country safeguard systems at the project level – AIIB, IDB, and the World Bank. AIIB’s Environmental and Social Framework provides that, at a borrower’s request, AIIB may offer a client the option to use all or part of the client’s existing environmental and social management system for all or part of a project. The offer is subject to a review and determination by AIIB that the client’s system is materially consistent with the objectives of AIIB’s Environmental and Social Policy and is adequate to address the risks and impacts of the project for which it is proposed. If a client’s environmental and social management system is approved for use with a project, AIIB maintains its supervisory role in project implementation. IDB allows the use of a borrower’s framework where a review finds that it is functionally equivalent to IDB’s Environmental and Social Policy Framework.

9. The World Bank supports the use of a borrower’s safeguards framework for a project, provided that the framework is materially consistent with the Bank’s Environmental and Social Standards (ESS). The World Bank has also recently supported the application of national labor laws in lieu of the WB ESF Standard on labor and working conditions in selected cases where relevant labor organizations reported that national labor laws are successfully being implemented. In the case of Projects, if the Bank and a borrower agree to use all or part of the borrower’s safeguards framework, the Bank will review the framework to assess whether it will enable the project to meet objectives that are materially consistent with the ESS. In addition, at the request of a borrower, the Bank may conduct an Overview Assessment of the borrower’s existing policy, legal, and institutional framework and its implementation capacity for addressing environmental and social risks and impacts. The objective of an overview assessment is to identify where the borrower’s framework needs strengthening and the capacity building that would be required to support that. An overview assessment is not a prerequisite for using a borrower’s safeguards framework for a project but, where an overview assessment has been carried out, the findings will be used in determining whether the borrower’s framework is materially consistent with the ESS.

C. ADB Experience with Using Country Safeguard Systems

10. To date, ADB has focused on assessing the use of CSS at the agency level, rather than at the project level. ADB has only approved the use of agency level CSS in one case – Power Grid Corporation of India, in 2017 (POWERGRID).5 An agency-level safeguards review was conducted for POWERGRID, a legally registered company with financial and operational autonomy and with its own corporate Environmental and Social Policy and Procedures (ESPP). The assessment of Power Grid focused on the ESPP and not with national laws and regulations on environmental and social safeguards. An Action Plan on gap filling measures was included as part of the project’s legal agreements. Following the POWERGRID project, in the period 2017 to 2019, three DMCs – India, Indonesia, and Sri Lanka – requested ADB to assess the

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5 Power Grid Corporation of India Limited (POWERGRID), is a Schedule ‘A’, ‘Maharatna’ Public Sector Enterprise of the Government of India, which was incorporated on 23 October 1989 under the Company Act, 1956. POWERGRID is a listed Company, with 51.34% holding of Government of India and the balance is held by Institutional Investors and public.
feasibility of using CSS at the agency level. The analytical work undertaken was reviewed, and the experience with each case is briefly described below. This experience indicates the challenges of implementing the assessment approach at the agency level and has been used to recommend more practical measures to evaluate the feasibility of using CSS.

(i) **Indonesia.** In 2017, following a request from the government of Indonesia, the use of agency-level CSS for environmental and involuntary resettlement safeguards was explored for future ADB-financed projects with the State Electricity Company (Perusahaan Listrik Negara/PLN), the lead agency in the energy sector. As PLN is a state-owned enterprise, its Board of Directors has the autonomy to issue decrees that are legally binding on PLN staff and contractors. The detailed safeguards review for PLN identified gaps between the CSS and SPS. ADB and PLN agreed on an action plan to fill those gaps and PLN adopted a decree to implement the gap-filling action plan. However, the proposal to use CSS for PLN operations could not be submitted to the ADB Board of Directors due to delays caused by COVID-19 and subsequent changes in the legal framework of Indonesia that require further analysis.6

(ii) **India.** Concurrently with the request to apply POWERGRID’s ESPP, in 2016 the Government of India requested an overall national safeguards review for all three SPS safeguards as well as sector-level summary equivalence assessments for environmental and involuntary resettlement safeguards in the energy and power sector, and only for environmental safeguards in the roads and highways sector. Draft equivalence assessment reports were prepared and shared with the government for feedback. Once the feedback is completed, ADB will finalize the assessments and discuss the next steps with the government.

(iii) **Sri Lanka.** In 2017 the Government of Sri Lanka requested safeguards review for agency-level use of CSS by the Road Development Authority (RDA). RDA is a state-owned enterprise but, in contrast to Power Grid and PLN, it is not autonomous and does not have the authority to issue binding directives. The assessments were undertaken, and gaps were identified in the environmental and involuntary resettlement safeguards. Due to the non-autonomous status of RDA, it was not possible to legally fill the equivalence gaps with agency-level regulations, as was possible for Power Grid and PLN. ADB and RDA agreed that ADB’s further support should focus on acceptability, to build RDA safeguards implementation capacity. This support involved updating safeguards manuals assisting RDA to continue to strengthen its capacity to implement safeguards. Changes to address equivalence gaps would however require changes to laws and regulations.

**D. Challenges with Assessing the Use of Country Safeguards Systems and Current Methodology**

11. Experience with the cases mentioned above shows that it is challenging to establish equivalence under the current CSS assessment methodology. The SPS policy principles are comprehensive, and also complex, with a broad range of requirements. A single environmental safeguards policy principle may encompass several aspects with associated requirements. When subjected to detailed analysis, the legal frameworks in the three countries studied were not found to be equivalent to the SPS.

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6 This included the passage of a new law that included significant amendments to the framework of environmental and spatial planning laws.
Furthermore, it was seen that establishing equivalence is a dynamic process, given that changes in laws and regulations necessitates reassessment for equivalence. This can occur at any stage in the process and can trigger the need for additional assessments and public consultations. Two other significant challenges relate to (i) identifying and then compiling the vast legal texts of applicable regulations and (ii) getting reliable translations and objective interpretations of the legal instruments.

12. Filling equivalence gaps is both a substantive and procedural challenge. In India and Indonesia, where the relatively autonomous state-owned enterprises have the authority to make corporate rules, it was possible for ADB to agree with the enterprises on action plans to address equivalence gaps. In Sri Lanka, where the state-owned enterprise did not have similar regulatory autonomy, an agency-specific action plan was not possible and the time that would have been required to fill the equivalence gaps through standard legislative and regulatory procedures made that option unfeasible. Similarly, the institutional structure of a client agency can be a dealbreaker for acceptability if it cannot be adapted to accommodate safeguards requirements.

13. The conduct of acceptability assessments can also be challenging due to inadequate data on safeguard implementation. National and sectoral authorities do not necessarily maintain sufficient documentation to inform and support a robust acceptability assessment, even when national law requires monitoring. In some cases, consultations with civil society organizations have also suggested gaps in acceptability, and this requires careful review and validation. Furthermore, changes in legal frameworks and regulations, may potentially leave gaps in acceptable track records and capacity, as experience in implementation of new requirements is being developed.

E. Lessons Learned from Strengthening and Assessing Country Safeguard Systems

14. Early and strategic engagement with DMCs may be pursued e.g., through policy dialogue during country partnership strategy (CPS) preparation, to identify priorities for strengthening CSS and to program TA and other resources to support these. The safeguard reviews undertaken showed that the methodology set out in the SPS for assessing equivalence and acceptability is insufficient to address the more detailed aspects of the analytical work. The experience in carrying out the assessments can be used to further develop the CSS assessment methodology.

15. There is need to strengthen the strategy and approaches used to build the capacity of and approaches for safeguards in DMCs, both in government agencies and other stakeholders, and at the project level. Factors to consider include the target capacities to be built, the relevant executing and implementing agencies to be engaged, appropriate training methodologies for each target group, preparation of guidance materials and how to ensure that they are available in formats and languages that are useful to participants. Another consideration is the delivery mechanisms for these capacity building programs. Training resources should be translated into national languages for trainees to fully benefit from them and to broaden the dissemination of safeguards concepts and practices. Hands-on experience through direct project implementation is also preferable to classroom-based training approaches.

16. Integrating safeguards reviews with capacity building initiatives can be mutually supportive. For ADB operations, comprehensive, good quality safeguards assessments could be used as baselines and indicators for project supervision and
monitoring. Assessment of the DMC safeguards frameworks can help ADB to understand where a DMC needs support and should help DMCs to understand where they need to strengthen their regulatory frameworks.

F. **Strategy 2030 and Future Directions for CSS in ADB**

17. ADB’s Strategy 2030: Achieving a Prosperous, Inclusive, Resilient, and Sustainable Asia and the Pacific, sets environmental and social safeguards as one of the focus areas for ADB’s key operational priority on strengthening governance and institutional capacity. Under Strategy 2030, ADB can support the use of country systems for environmental and social safeguards through a context-specific approach.

18. Three reports by the Independent Evaluation Department (IED) also indicate strategic directions for CSS:

   (i) **Evaluation of the effectiveness of the SPS (2020).** The report calls for re-aligning the SPS to be consistent with the emphasis in Strategy 2030 on high-level outcomes. It highlights a need to move from assessing CSS to focus on building DMC capacity for safeguards through a country systems approach, and to develop safeguards procedures and guidance documents for ADB staff and clients.

   (ii) **Evaluation of strengthening safeguard capacity in the Pacific (2019).** This evaluation of five TAs concluded that ADB should follow up by supporting Pacific countries to draw on their own CSS by: (i) helping countries retain safeguard skills and knowledge; and (ii) expanding the talent pool available in each country, for example through on-the-job training. Additional follow-up measures specified addressing gaps in the environmental regulatory frameworks and conducting follow-up assessments on land issues and involuntary resettlement together with more in-depth indigenous peoples safeguard assessments in the context of negotiated settlements.

   (iii) **Evaluation of ADB’s policy-based lending (PBL) for the period 2008-2017.** The report suggested another use for CSS. The evaluation found that PBL had not been commonly used in combination with project investments in ADB’s traditional sectors of energy, water, and transport and recommended that it be used strategically to ensure that there is support for policy reform that minimizes constraints on achieving development outcomes. The PBL evaluation and the evaluation of the effectiveness of the SPS focused primarily on whether PBL triggered safeguards rather than on how PBL could be a modality that could support safeguards.

19. Strategy 2030 and the IED evaluations make clear that integrating safeguards into ADB’s operations must be done beginning at the strategic planning level.

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Next Steps

20. Experience in assessing the feasibility to use CSS at the agency level in the region has shown that it was only possible in one case, the India POWERGRID project. The factor that enabled this was that POWERGRID had institutional structures that allowed for good practice actions to be incorporated into the agency’s CSS. However, this was not seen to be possible for other government agencies, that do not have their own safeguards systems, and solely follow national safeguards laws and regulations, and also do not have any authority of making changes to these national regulatory frameworks. Hence, establishing equivalence through gap-filling provisions is not possible. Therefore, further options need to be considered in terms of assessment processes, modalities and capacity development if strengthening and use of CSS is to be realistically considered. A range of options are considered below.

(i) **Early engagement and diagnostics as part of country dialogue:** Increased dialogue and diagnostics on country systems can be included as part of ADB country partnership strategy development. This can help identity safeguard issues and gaps with respect to CSS and implementation capacities. Implications for planned ADB portfolio and projects can then be assessed, as well as wider DMC interest for strengthening policies, laws, regulations, and capacities.

(ii) **Progressively strengthening CSS and capacities through linkage to different financing modalities.** ADB has a number of financing modalities that can be used to strengthen and or progressively build country safeguards systems capacity. This includes policy-based lending (PBL) and results-based lending (RBL). Stand-alone PBLs are already used to support government policy reforms and have frequently been used for financial sector and public sector management reforms. Similar approaches can be used for safeguards. This can provide opportunities for unlocking development and investor financing by converging national systems towards good practices for safeguards. RBLs also provide an opportunity as they utilize country systems applicable to the program, with the ADB safeguard policy used as a benchmark for compliance. This is based on detailed safeguard systems assessments for the program. Gaps between the SPS and program systems are assessed (covering both national legal framework and implementation capacity) and gaps are identified at the level of the program and are filled through an action plan. The RBL modality therefore may be a good starting point, wherein national capacity can be built at the level of the institution implementing the RBL by improving practice and introducing enhanced systems at the level of the program.

(iii) **Exploring potential to assess CSS at the project or standards level.** As with the AIIB, IDB and World Bank, ADB could explore possible application of CSS at the project level. With the World Bank, use of a borrower’s safeguards framework can be applied at a project level, provided that the framework is materially consistent with the World Bank’s ESS. As recently done by the World Bank, ADB could explore possible application of CSS at the level of a selected standard. National labor laws have been used, where the relevant labor organizations reported that national labor law implementation was successful. A standard-by-standard approach could be looked into for future cases. The advantage of these approaches is that assessments can consider not only if there is material consistency between the ESS and CSS, but also the context
of project specific risks and capacity needs. Any gap filling actions, and capacity needs can be linked to the project and covenanted through legal agreements. Focus can also be given to any specific elements of the ESS that can be included or not included. This approach has some similarities to the approach already undertaken for RBLs. Suitability for such an approach in any particular DMC would still however need to be informed by good country diagnostics and consultation processes with stakeholders.

(iv) **Strengthening capacities.** Regardless of the approach for using CSS, there is a recognized need to continue to build and support DMC capacity. This should be informed by country dialogue and diagnostics, with targeted support programs for different sectors and safeguard standards. Increased funding and development partner coordination can help facilitate and support increased capacity. This is made increasingly feasible with greater convergence between MFI environmental and social standards. Experience from past collaboration activities, including the establishment of safeguard learning centers in several DMCs can be used as a starting basis to scale-up.

21. ADB will undertake further study and analysis on how new and emerging approaches can be integrated into the revised policy. Feedback on areas identified in this preliminary analysis will be incorporated into the ongoing discussion on the policy update. Stakeholder inputs and recommendations will be solicited to enhance the analysis. These studies are ongoing and will be integrated into future reports.

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