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Possible Introduction of Blanket Waiver of Member Country Procurement Eligibility Restrictions for Cofinanced Operations

Asian Development Bank

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ABBREVIATIONS

ADB	–	Asian Development Bank
ADF	–	Asian Development Fund
OCR	–	ordinary capital resources country partnership strategy

NOTE

In this report, "\$" refers to US dollars.

In preparing any country program or strategy, financing any project, or by making any designation of or reference to a particular territory or geographic area in this document, the Asian Development Bank does not intend to make any judgments as to the legal or other status of any territory or area.

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I. BACKGROUND

1. In financing the procurement of goods and services in its operations, the Asian Development Bank (ADB) is constrained by legal restrictions that tie procurement generally to ADB membership. Donors to the Asian Development Fund (ADF) have asked ADB to report on possible options to ease these restrictions.

2. ADB distributed a paper entitled *Review of Member Country Procurement Eligibility Restrictions at the Asian Development Bank*¹ among donors in November 2011 and presented it at the ADF XI replenishment meeting in Dhaka, Bangladesh 5–6 December 2011. The paper (i) describes ADB's existing member country procurement restrictions, (ii) shows that the restrictions were originally introduced as incentives for developed countries to join ADB and contribute to ADB Special Funds, and (iii) explains ADB's practice of seeking case-by-case waivers of the restrictions for specific projects. The paper also discusses member country procurement restrictions of other multilateral development banks, and policy considerations and the potential impact of procurement liberalization. It concludes with possible options to ease ADB's existing member country procurement eligibility restrictions. These range from complete removal of restrictions to partial liberalization through the continued use of case-by-case waivers or through the introduction of blanket waivers.

3. ADB Management has solicited the views of donors—both before and after the ADF XI replenishment meeting in Dhaka—on procurement liberalization and the options to ease ADB's existing member country procurement restrictions. The consultations have shown that there is not a clear consensus. Some donors favor procurement liberalization, some oppose liberalization or have strong hesitations, and others have no strong views on the subject.

4. The consultations indicated that donors were unlikely to reach consensus on a complete removal of the existing member country procurement eligibility restrictions. However, ADB Management believes the consultations provided sufficient grounds to explore donor interest in a partial liberalization of ADB's eligibility requirements through a blanket waiver of the member country procurement restrictions in the case of cofinancing for ADF-financed operations. Such a blanket waiver would facilitate contributions from cofinanciers whose eligible source countries for procurement include countries that are not eligible sources of ADF-financed procurement.

II. IMPORTANT CONSIDERATIONS

5. Donors were inclined to agree that a blanket waiver for cofinanced operations deserves consideration both as a matter of principle and as a matter of operational efficiency. Regarding principle, a blanket waiver for cofinanced operations would be consistent with the reason member country procurement eligibility restrictions were introduced, i.e., to attract contributions by offering procurement eligibility. As a matter of operational efficiency, untied procurement is often particularly important for cofinancing. Where the funds of ADB and the cofinancier are comingled to finance agreed items of expenditure, different procurement eligibility rules cannot be applied.² Some cofinanciers cannot accept ADB's member country procurement eligibility restrictions and require that ADB waive those restrictions as a condition for securing cofinancing resources. Between January 2003 and December 2011, ADB's Board of Directors approved 31

¹ ADB. 2011. *Review of Member Country Procurement Eligibility Restrictions at the Asian Development Bank*. Manila.

² These types of situations typically arise when it is technically difficult, or impossible, to segregate particular procurement packages (e.g., integrated plant construction, operation, and maintenance) or where segregating contract packages is possible but will likely result in a less-than-optimal cost outcome.

requests for waivers of the procurement eligibility restrictions. In 13 cases, the waiver served to mobilize cofinancing resources by allowing procurement from countries that are not ADB member countries.

6. As a practical matter, a blanket waiver in the case of cofinancing for ADF-financed operations should probably only be introduced if it is accompanied by a similar blanket waiver for operations financed from other ADB resources, especially ADB's ordinary capital resources (OCR). It would, for example, be very odd for an executing agency to be free to engage consultants from a non-member country for a project component funded by ADF but forbidden to do so for another component financed by OCR. In blended projects where OCR and ADF funding is not allocated to particular components, the absence of uniform eligibility rules would be even more problematic.

7. If donors agree to introduce the possibility of a blanket waiver for cofinanced operations, ADB would need to consider the criteria, thresholds and any other circumstances that would 'trigger' a particular blanket waiver. To allow ADB the necessary flexibility, it would be useful if the relevant Board of Governors' resolution, the ADF Regulations, and ADB procurement policies³ (i) refer only to the possibility of a blanket waiver for cofinanced operations in broader terms and (ii) authorize the Board of Directors to approve the exact parameters for such a blanket waiver or waivers. This approach would also offer flexibility in meeting evolving needs.

III. LEGAL STEPS TOWARD INTRODUCING A BLANKET WAIVER

8. The Appendix to this paper sets out the member country procurement eligibility restrictions applicable to ADB-financed operations.

9. The following would be required to introduce a blanket waiver in the case of cofinancing for ADF-financed operations: (i) the prior consent of every contributor to amend the ADF Regulations, (ii) the approval from the Board of Governors to amend Resolution 62⁴ with respect to current and future replenishments, (iii) a special resolution of the Board of Directors to amend the ADF Regulations,⁵ and (iv) the approval by the Board of Directors to amend ADB's Procurement Guidelines (2010) and Guidelines on the Use of Consultants (2010).⁶

10. To introduce a blanket cofinancing waiver for the Asian Tsunami Fund, the Japan Special Fund, the Pakistan Earthquake Fund, and the Technical Assistance Special Fund, approval from the Board of Directors would be required as well as consultation with or (in the case of the Japan Special Fund) consent from contributors. For the other Special Funds, a blanket cofinancing waiver would apply once ADB policies and procedures allow it; no further action would be required.

³ See paras. 8–11 for a description of the applicable regulatory framework and a summary of the legal steps towards the introduction of a blanket cofinancing waiver.

⁴ ADB. 1973. *Resolution of the ADB Board of Governors*. Manila (Establishment of the Asian Development Fund).

⁵ Section 1.02 of ADF Regulations defines a special resolution of the Board of Directors as a resolution "which is approved by a majority of the Directors, representing not less than two-thirds of the total voting power of the members of ADB."

⁶ This assumes that a blanket waiver in the case of cofinancing for ADF-financed operations would be introduced both for contributions and for other resources (including reflows). This is relevant because different eligibility criteria apply to ADF contributions and other ADF resources. See the Appendix to this paper for further details.

11. In addition, to introduce a similar blanket waiver for OCR-financed operations, the Board of Directors would have to approve the waiver by a vote representing not less than two-thirds of the total voting power of the members.

IV. ISSUES FOR DONOR CONSIDERATION

12. ADB seeks guidance from donors on the following:
- (i) whether to introduce the concept of a blanket waiver for cofinanced operations in the regulatory framework applicable to ADF, and, if so;
 - (ii) whether the Board of Directors should be authorized to approve the parameters for such a blanket waiver and/or to grant such blanket waivers from time to time.

MEMBER COUNTRY PROCUREMENT ELIGIBILITY RESTRICTIONS APPLICABLE TO ADB-FINANCED OPERATIONS

1. **Charter restriction.** For operations financed from ordinary capital resources (OCR), member country procurement eligibility restrictions follow directly from Article 14 (ix) of the Agreement Establishing the Asian Development Bank (the Charter)¹:

The proceeds of any loan, investment or other financing undertaken in the ordinary operations of the Bank or with Special Funds established by the Bank pursuant to paragraph 1(i) of Article 19, shall be used only for procurement in member countries of goods and services produced in member countries, except in any case in which the Board of Directors by a vote of the Directors representing not less than two-thirds of the total voting power of the members, determines to permit procurement in a non-member country or of goods and services produced in a non-member country in special circumstances making such procurement appropriate, as in the case of a non-member country in which a significant amount of financing has been provided to the Bank;

2. **Restrictions to ADF rules.** Member country eligibility restrictions in relation to procurement financed from Asian Development Fund (ADF) resources are laid down in (i) Resolution No. 62 of the Board of Governors dated 28 April 1973 on the establishment of ADF²; and subsequent replenishment resolutions (ii) the Regulations of the Asian Development Fund dated 27 April 2009 (ADF Regulations)³, and (iii) the Asian Development Bank (ADB) procurement policies discussed in paragraph 7 below.

3. Resolution No. 62 provides in paragraph 5:

- (c) Except to the extent otherwise authorized by the Board of Governors, contributions to the Fund shall be drawn down to finance, on a reciprocal basis, procurement in all contributor countries and developing member countries of the Bank, of goods and services produced in and services supplied from such countries.
- (d) Other resources of the Fund shall be available for procurement in all member countries of the Bank of goods produced in and services supplied from such countries.

4. Section 4.03 of the ADF Regulations provides in relevant part:

ADB may draw upon resources of the Fund to finance procurement expenditures under loans and grants in accordance with the following principles:

- (a) Contributions may be drawn down by ADB to finance expenditures in the territories of all Contributors and of all developing member countries of ADB, for goods produced in and services supplied from such territories.
- (b) Other resources of the Fund, including all amounts received from borrowers in repayment of loans, may be used to finance expenditures in

¹ ADB. 1965. *Agreement Establishing the Asian Development Bank*. Manila.

² See footnote 4.

³ ADB. 2009. *Regulations of the Asian Development Fund*. Manila.

the territories of all member countries of ADB, for goods produced in and services supplied from such territories.

5. Section 6.01 of the ADF Regulations provides in relevant part:

These Regulations may be amended, after consultation between ADB and the Contributors, by Special Resolution of the Board of Directors;⁴ provided that the prior consent in writing of every Contributor shall be required before the coming into effect of any amendment modifying ... the provisions on use and drawdown of Contributions contained in Section 4.03.

6. **Restrictions in Special Funds rules.** Article 19 of the Charter provides the legal basis for ADB Special Funds. Pursuant to this article, ADB has established eight Special Funds. These are (i) ADF (ii) the Technical Assistance Special Fund, (iii) the Japan Special Fund, (iv) the Asian Development Bank Institute Fund, (v) the Asian Tsunami Fund, (vi) the Pakistan Earthquake Fund, (vii) the Regional Cooperation and Integration Fund, and (viii) the Climate Change Fund. The rules and regulations of all the funds contain restrictions that generally tie procurement either to (i) the contributor countries and ADB developing member countries or (ii) ADB member countries generally.

7. **Restrictions in ADB procurement policies.** Member country procurement eligibility restrictions on OCR-financed and ADF-financed procurement are also laid down in ADB policies on procurement, i.e., the Procurement Guidelines (2010, as amended from time to time)⁵ and the Guidelines on the Use of Consultants (2010, as amended from time to time)⁶.

⁴ Section 1.02 of ADF Regulations defines a Special Resolution of the Board of Directors as a resolution which is approved by a majority of the Directors, representing not less than two-thirds of the total voting power of the members of ADB.

⁵ ADB. 2010. *Procurement Guidelines*. Manila.

⁶ ADB. 2010. *Guidelines on the Use of Consultants*. Manila.