

An Evaluation of the Asian Development Bank’s Approach to “Country Safeguard Systems”

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The Asian Development Bank’s proposed Safeguard Policy Statement (SPS) endorses the use of a “country safeguard systems” (CSS) approach to addressing the environmental and social impacts of projects the ADB funds. Pursuant to this approach, the ADB would use a country’s “system” – its legal and institutional framework¹ - rather than the full suite of existing ADB environmental and social safeguard policies and procedures and ADB institutional units, to avoid, mitigate, or minimize adverse impacts of Bank-supported projects. The ADB’s proposed methodology is similar in key respects to that being used by the World Bank in its “country systems” pilot program, which began in 2005.²

Similar to the World Bank’s approach to date, the ADB’s proposal requires that, prior to approval of a CSS project, the ADB determine: (1) whether the country’s laws, regulations, rules and procedures are “equivalent” to the objectives and principles of ADB safeguard policies; and (2) whether the country’s institutions are “acceptable”, reflecting the capacity and track record to implement those laws. If gaps in equivalence or acceptability are identified, instead of denying the use of the country’s system, the ADB can require that the country adopt certain gap-filling measures.

One significant difference between the current World Bank approach and the ADB proposal, however, is the scale at which equivalency and acceptability determinations and measures to fill gaps are undertaken. To date, the World Bank’s pilot process has taken a “project-by-project” approach to assessing equivalence and acceptability and to filling gaps. In other words, the World Bank has assessed equivalence and acceptability *for each* pilot project and has required each country to fill only the gaps that are relevant for a given project. For

¹ Consultation Draft of the Safeguard Policy Statement, Appendix 3, p. 40. This framework includes “national, sub-national, or sectoral implementing institutions and relevant laws, regulations, rules, and procedures, which pertain to the policy areas of environmental and social safeguards.”

² In 2005, the Executive Directors of the World Bank (WB) authorized the use of country systems (CS) during a two-year period to be governed by OP 4.00, *Piloting the Use of Borrower Systems to Address Environmental and Social Safeguard Issues in Bank-Supported Projects*. Since July 2005, only six projects have received Board approval, some very recently. In order to accelerate the use of a country systems approach, Bank management has recently proposed the launch of a country-wide pilot program, for which the country system would govern all Bank-funded projects in that country. The country pilot program could involve eight countries in the first year.

example, in Romania, the World Bank performed “equivalency” and “acceptability” determinations for each of the two projects approved. For each project, it sought to identify all gaps in the legal and institutional framework of Romania, but, for each project, required Romania to fill only those gaps that were relevant to implementation of the projects.

The ADB is, instead, proposing an approach that is similar to the one very recently approved for piloting by the World Bank (these pilots have not yet been undertaken by the World Bank). The ADB appears to be proposing that equivalency assessments to identify gaps in the legal framework of a country be performed only **once** at the national, sub-national, or sector level (depending on the level proposed by the borrower/client). Action Plans to fill these gaps would be prepared. All subsequent projects in the selected countries, sub-regions, and sectors would then use the agreed system. The ADB proposal does not explicitly specify that once assessment of gaps has been completed all gaps would be addressed immediately. It is possible that although the assessment would take place only once, gaps would be addressed incrementally, as they need to be addressed in the context of a given project. The ADB proposal seems to indicate that the “acceptability” determination (the analysis of a country’s capacity and willingness to implement its legal framework) would, unlike the equivalency determination, occur on a project-by-project basis.

Because basic aspects of the ADB’s methodology are similar to those of the World Bank’s, many of the issues highlighted in our analysis of the World Bank’s pilot projects provide a useful starting point for an analysis of the ADB’s proposal. Following is a summary of the concerns raised by the ADB’s proposal, with reference to relevant issues raised by the World Bank pilot project process.

Too Much, Too Soon

- The ADB relies on the World Bank’s experience with its country systems pilot projects as precedent for development of the ADB policy. However, for several reasons, experiences of the World Bank with its pilot process to date provide inadequate grounding for the ADB proposal. First, the World Bank admits that it is too soon to draw any conclusions from its pilot projects, noting that “most of the data obtained from the pilots reflect the experience of project preparation rather than project implementation.”¹ Consequently, it has extended the evaluation period in order to assess the use of country systems during project implementation. Second, projects chosen for the World Bank pilot program have been very carefully selected – no category A projects have been evaluated. Finally, as noted above, the Bank has taken a “project-by-project” approach to the pilot process to date, and the ADB proposal is to bypass this approach. The ADB should not approve the wholesale use of CSS until pilots at the project and country level have been completed and

thoroughly evaluated to ensure that communities are no worse off than under ADB safeguard policies. Such an approach would be consistent with the ADB management's endorsement of a "cautious and phased approach" to the application of a country systems approach for ADB projects.³

- The Safeguard Policy Statement (SPS) does not specify if CSS would be used for ADB private sector investments. Use of CSS in the context of private sector investment raises a host of new questions that will not be answered by the World Bank's pilot program.

Standards Are Reduced

Our analyses of the World Bank's pilot projects highlight that use of a CSS approach to lending can reduce environmental and social standards on paper - and in practice - in the following ways:

- Environmental and social standards can be reduced when the "principle" used to implement the CSS approach requires less than the original environmental or social standard;
 - In our analysis of the ADB CSS proposal, we found several examples of the "principle" requiring less than the policy (see *Attachment A, matrices comparing ADB "principles" to the ADB policies*). Several particularly concerning examples are listed below in relation to the areas of Environmental Management Plans (EMPs) and Involuntary Resettlement (IR).
 - *For example- EMPs.* The borrower country under the ADB policy principle has no obligation to identify necessary corrective actions and update the EMP as project conditions change. Further there is no express allocation of responsibility for the costs of ongoing monitoring, and no specific requirements about the contents or the way in which regular project progress reports should be made accessible to the public.
 - *For example- IR.* The IR policy principle contains several deficiencies, one of the most concerning being the absence of important details about the grievance mechanism for project affected peoples. The policy principle gives no details about the content of an appropriate grievance mechanism, no requirement that under the mechanism

³ Management's response to the OED report [stressed](#): "the need for a cautious and phased approach to any proposals for wide application of country systems for ADB projects."

concerns must be addressed efficiently and in an understandable and transparent manner, and no express requirement that affected people need to be informed about the very existence of the grievance mechanism.

- In our analysis of the ADB approach we found that the safeguard principles omit certain critical requirements that are enumerated within the detailed safeguard policy attachments:

For example:

- The environment principles do not include the prohibition on the introduction of invasive alien species.
 - The involuntary resettlement principles do not include the requirement to use qualified and experienced resettlement specialists to determine resettlement impacts.
 - The indigenous peoples (IP) principles do not include the requirement to document the processes and outcomes attained from consultations with IP and IP organizations.
- A standard can be reduced when the principle provides for flexibility in how it is satisfied and the country's laws, policies, or procedures – or measures to fill gaps in these laws, policies, or procedures – leave a reduction in standards (compared to the original standards). We noted examples of this in our analysis of the WB's pilot projects.
 - *For example:* The World Bank consistently in its equivalency assessments failed to require implementation of mitigation measures by the borrower country within *specific* timeframes. The ADB's SPS document similarly fails to specify *when* the gap-filling measures, incorporated into an Action Plan, should be adopted.⁴
 - In failing to provide specific timeframes for implementation of requisite mitigation measures, the WB and ADB make it very difficult for communities to raise project-related grievances, as they will not know the specific requirements with which the project must comply, or *when* the requirements can be expected to be implemented.
 - Even when the “principle” and the original standard appear to be very similar, the standard can be reduced in two ways:

⁴ SPS page 42, para 13

- Even when the principle and original standard appear to be similar, the standard can be reduced when the country’s laws, policies and procedures embraced by the bank are not truly “equivalent” to the standard. This has been observed in our analysis of the WB pilot projects.
 - *For example:* In the WB Egyptian pilot project, the Bank concluded that there had been a “significant gap” in terms of the equivalency of Egyptian EIA legislation with the WB CS standards, as Egyptian law failed to require mandatory disclosure of EA documentation. The WB nevertheless failed to demand FULL equivalency with its EA disclosure safeguard principle under OP 4.00,⁵ and instead allowed the Egyptian government to maintain a broad legislative exception to its EIA disclosure obligations in cases where EIA documentation was deemed sensitive for “trade, technology or security reasons”.⁶
 - In addressing the Egyptian disclosure gap, the WB commented that the agency was planning to include mandatory disclosure requirements in its forthcoming revised EIA procedural and sectoral guidelines, but the WB neither conditioned the use of the CS ‘principles’ on the adoption of the new disclosure guidelines, nor detailed what those disclosure guidelines should include. Instead, it was “agreed” that during the pilot project all EIA reports would be disclosed except for those in the aforementioned sensitive categories.
 - This approach by the WB is problematic not only because the WB embraced the Egyptian approach, which adopts less than full disclosure of EA reporting contrary to WB standards, but also because the partial disclosure mitigation measure did not affect a permanent change to the Egyptian EIA system towards a disclosure best-practice approach (and thus not meeting the overall objectives of the WB CS strategy).
- Even when the bank principle and the safeguard policy are similar, the standard can be reduced when measures proposed for filling “gaps” in a country’s existing laws, policies, or procedures, are inadequate. Our analysis of the WB’s pilot projects indicates that this is one of the most significant ways standards can be reduced under a CSS approach. Gap-filling measures can be inadequate in the following ways:

⁵ OP 4.00(11).

⁶ Egyptian SDR, page 27.

- When gap-filling measures are not mandatory or permanent changes in law or policy. For example, in some of the WB pilot projects the WB stated that mitigation measures are to be adopted by the borrower country to attain equivalency with Bank standards, but the WB did not clearly frame these measures as WB *requirements* or pre-conditions for projects to be appraised, financed or implemented. This unnecessary lack of clarity on the part of the WB only increases uncertainty for project-affected communities, as it reduces community understanding of *what* the standard is (mandatory, voluntary or purely aspirational) and *when* they can expect the borrower country to act (if at all).
- When gap-filling measures are not as stringent – the measures will not produce comparable results and/or will not be implemented as early in the project, as measures that would have been required pursuant to the original standards.
 - *For example:* In the Egyptian pilot project, the Bank in its equivalence assessment noted that Egyptian EA legislation does not apply the WB *Pollution Prevention and Abatement Handbook* (PPAH) standards (or justified deviations when alternatives to the PPAH would be used)⁷, which is an EA requirement under the CS principles in OP 4.00.⁸ The WB, however, did not require any gap-filling measure by the Egyptian Government to comply with this principle, explaining that no new industrial plants would be financed under the project and that the old plants operated under financial constraints.⁹ Nevertheless, neither OP 4.00 nor the PPAH provide exceptions from the PPAH standards for old industrial plants. This is a further example of the WB allowing for less stringent safeguard standards to be applied to the six pilot projects, despite the mandatory requirements under the existing safeguard standards and CS safeguard policies.

Communities Face Increased Challenges in Preventing and Reducing Adverse Impacts of Projects

Communities can have a more difficult time preventing and reducing the adverse impacts of projects when using accountability mechanism processes is difficult. Use of the CSS approach can make it more difficult for communities to use accountability mechanisms because the approach can make it more difficult for communities to know when a policy is being violated.

⁷ Egyptian SDR, page 26.

⁸ OP 4.00(5).

⁹ Egyptian SDR, page 26.

Although the principles provide the general standards applicable to a project, a host country's laws, policies, and procedures flesh out and give greater definition to these general standards. When gaps in the countries laws, policies and procedures exist, the gap-filling measures are designed to provide this further definition.

Accessing and understanding the country's laws, policies, and procedures and any gap-filling measures – as well as knowing when they are to be applied – may be very difficult. The ADB's proposal fails to specify the level of detail that will be provided in Action Plans. Significantly, the proposal fails to identify when measures to fill gaps must be implemented. Additionally, it does not mention specifically that measures must be systemic, permanent and mandatory. This should be made explicit, given the deficiencies in gap-filling measures in the WB pilot process.

Simply put, the principles of the ADB policies do not provide the 'full picture' to communities of the standards applicable to a project. A community can file a claim for an apparent violation of a principle, but in the absence of clear information about what the ADB has embraced in satisfaction of that principle – either the existing laws, policies and procedures of the country or the gap-filling measures – it will be difficult for a community to know if a given activity is acceptable or not. In the absence of this knowledge, a community could be wasting its time, energy, and resources in pursuing a complaint; it cannot assess the likelihood of success with such a claim until after it knows how the ADB interprets the principle. Alternatively, in the absence of this knowledge, a community could be dissuaded from filing a complaint.

Strong System-Level Changes Are Not Achieved

Proponents of the country systems approach argue that the costs and risks (including the significant risk that safeguard standards will be reduced) of such an approach are worth it for the benefit – stronger safeguards for all projects, not just those of the banks pursuing this approach. A stronger country system is a laudable goal, but, for the following and other reasons, the approach being pursued by the ADB will not necessarily achieve this goal and is not the *best* approach to achieving this goal:

- The approach fails to acknowledge that, in facing pressures from powerful clients, banks will often back down from requiring and enforcing strong standards. In a recent analysis of Action Plans developed by World Bank management and approved by the World Bank Board in the context of efforts to address issues raised by Inspection Panel claims, it was determined that significantly less than half of the Panel's findings of non-compliance with policies were addressed in Action Plans prepared for projects in India and China.¹⁰ Moreover, implementation of Action Plans was inadequate (raising "acceptability" concerns). Will a country systems

¹⁰ See Appendix II, "Tess Bridgeman Study Summary" p. 4.

approach simply provide these powerful countries easier and less noticeable opportunities to continue doing what they want to do, regardless of ADB standards?

- As noted above, gap-filling measures are not always mandatory, permanent or adequate;
- Language used by the World Bank in its pilot project Safeguard Diagnostic Reviews reflects a lack of certainty that equivalent outcomes will be secured. For example, the WB's equivalence assessment for its pilot project in Romania found that the approach taken in its environmental assessment law "*should* achieve comparable outcomes as envisaged by the Bank under OP 4.00" and that a project "will *likely* be subjected under the Romanian system to at least an equivalent approach." This language suggests new risks posed by the use of the country systems approach, and highlights that, at the very least, more significant and independent monitoring must be required for every project to ensure that a country's "system" is truly comparable to that of the banks'.
- In several instances in its pilot projects, the World Bank assumed that a given government institution had the capacity to implement a law, policy or procedure even when the institution had no track record on which to base an assumption. Needless to say, lack of experience could result in significant lapses in implementation. In such cases, the ADB should require training, additional monitoring, and/or independent consultants to oversee implementation.

V. Recommendations

- **ADB should not adopt a country systems approach until the World Bank pilot projects have been completed, evaluated, and demonstrated not to have weakened safeguard protections.**
- **If and when that occurs:**
 - **Equivalency should be determined comparing the country's system with the detailed safeguard requirements found in the attachments of the SPS, not with the principles.**
 - **When a country safeguard systems approach is sought for implementation at any level, e.g. country, regional, sector, etc., significant consultations with civil society organizations, indigenous peoples, and others, will be important to ensuring that the country's system at these levels will be comparable to the Bank's – especially since the analysis of equivalency and proposals for gap-filling will occur only once. All laws,**

policies, procedures, etc. that are being used for the equivalency determinations must be made publicly available in the local language and in English and sufficiently in advance of public consultations to allow for a thorough evaluation by interested parties of the ADB's equivalency determination and proposed action plans and gap-filling measures.

- **Identified gap-filling measures should be specific, detailed, permanent changes to the country's regulatory regime, be included in the loan agreement, and disclosed to the public.**

- **The role of the ADB's accountability mechanism should be clarified more. It is possible that deficiencies in an equivalency determination and in gap-filling measures proposed at the country, sub-regional or sector level will be highlighted – or can only be highlighted – in the context of a given project. The ADB proposal must clarify that for each project communities can challenge the equivalency and acceptability determinations and gap-filling measures when they appear to be inadequate.**

- **Given the ADB's new focus on moving from a front-loaded approach to environmental and social safeguards to a "results-oriented" approach, the ADB must require that every project include benchmarks/criteria by which the ADB and others can judge whether the specific poverty-alleviation goals and objectives of a project will be met.**

