



Concerns regarding the ADB's Draft Safeguard Policy Statement

Submitted by Oxfam Australia to ADB's SPU process¹ 29 January 2007

Overview and background

The ADB currently has three safeguard policies: the Environment Policy (2002); the Indigenous Peoples Policy (1998) and the Involuntary Resettlement Policy (1995). According to the ADB, their purpose is to: "to avoid, minimize or mitigate adverse environmental impacts, social costs to third parties or marginalization of vulnerable groups that may result from development projects."² In 2005, the ADB embarked on a process, the Safeguard Policy Update (SPU) to review these policies. Together with a network of civil society organisations, Oxfam Australia has closely monitored the ADB's Safeguard Policy Update (SPU) since its beginning in 2005. Oxfam has engaged in dialogue with the ADB around the SPU process and submitted comments and recommendations for strengthening the ADB's three safeguard policies.³ Since the beginning of the SPU we have raised our concerns that the SPU should in no way lead to a weakening of the existing safeguard policies. At the ADB's 40th Annual Meeting in Kyoto, President Kuroda at the Meeting with Civil Society Organizations stated in regard to the SPU : " ...I assure you that we have no intention to dilute our safeguard policies; on the contrary, we consider them essential for improving the implementation of infrastructure and other development projects".⁴ Prior and subsequent assertions of this type have also been made by the SPU team and senior management. The purpose of a policy review normally is to improve the existing policy. Therefore, the Bank's commitment not to weaken the existing safeguard policies is a minimal obligation. While the existing safeguard policies contain some necessary requirements, they still fall behind international best practice and require **strengthening**, not merely retention or reformatting.

In light of the ADB's commitment not to dilute the existing policies, and the need to strengthen the existing framework, we are disappointed to note that the October 2007 Consultation Draft of the Safeguard Policy Statement (SPS) constitutes a significant weakening of ADB's existing safeguard policies, thereby contradicting the President's promise. The 2007 SPS draft also falls short of the commitments made in the October 2005 Discussion Note and thus takes the SPU process several steps backwards. The 2005 Discussion Note commits to "*enhancing the coherence, clarity and internal consistency*" (para 30) of the safeguards. A careful reading of the 2007 SPS draft quickly shows that this stated intention has not been met. On the contrary, the language and structure of the SPS draft create more confusion and obscure or weaken concrete safeguards requirements.

¹ Editing: Forest Peoples Programme

² <http://www.adb.org/Safeguards/default.asp>

³ See our publication "Safeguarding or disregarding: Community experiences with the Asian Development Bank's Safeguard Policies", Lia Kent and Michael Simon, Oxfam Australia in association with NGO Forum on ADB, January 2007

⁴ Opening Remarks by Haruhiko Kuroda, President, ADB at the Meeting of Civil Society Organizations at the 40th Annual Meeting of the Board of Governors, 4 May 2007;
<http://www.adb.org/Documents/Speeches/2007/ms2007039.asp>

In particular, we are concerned with the following key areas that constitute a weakening of the existing safeguards and/or the 2005 Discussion Note:

- (1) concern with the rationale of the SPU
- (2) failure to improve clarity, coherence and consistency
- (3) lack of clarity on operationalisation
- (4) inadequate requirements in regard to consultations
- (5) lack of harmonization
- (6) potentially harmful approach to country systems
- (7) weaker individual safeguards

The following sections elaborate on these concerns. This assessment only constitutes a summary of the top level concerns and does not represent a comprehensive analysis of the SPS draft. A number of CSOs have coordinated a comprehensive review of the detailed aspects of the SPS. The review pieces can be found at: <http://www.bicusa.org/en/Article.2851.aspx> - This summary draws on and acknowledges these analyses.

1. Concern with Rationale

Section II of the SPS under Changing Context refers to new lending modalities, stating that the “*current generation of safeguard policies was designed when direct project lending was the dominant modality for development assistance,*” (para 8.) Based on this context, the SPS further states that “*the new modalities, ...as well as changing client circumstances, suggest the need to enhance the effectiveness and relevance of ADB’s safeguards*”. Oxfam completely agrees with the need for improving the ADB’s safeguards and also with the need to ensure that it is possible for ADB staff and borrowing countries to effectively implement the safeguard policies. However we also hold that the central rationale for safeguard policies is to ensure that development initiatives and interventions are undertaken within the context of international law and in a manner that ensures environmental and social harm is avoided. Clearly the existing safeguard policies in that regard require enhancement. The changing regional context and the requirement for new lending modalities cannot be used as an excuse to cut safeguard requirements, but rather should be seen as a strong argument for an effective and comprehensive improvement and update to the safeguard system.

The emphasis in the draft SPS is on the ADB’s and borrowers’ needs. This is no surprise given that the Safeguard Policy Update, which began in 2005, is taking place in a time where ADB and member countries are reviewing the Bank’s role and effectiveness. In recent years, middle-income countries such as India and China have developed stronger economies and are therefore no longer as reliant on ADB lending. The ADB is finding itself in a situation where it has to review its role to ensure that it stays relevant. The emphasis on borrower needs in the SPS draft suggests that the ADB is bowing to pressure to make it “easier” for borrowers to lend and therefore ensure that they will continue borrowing.

This approach suggests that the ADB is addressing the Safeguard Policy Update with an undue bias to the borrower. The existence of Safeguard policies is not simply about borrowers, but about minimum standards of protection for affected people and the environment. The 2005 Discussion note rightly and clearly summarizes the importance of the safeguard policies as being “*central to achieving sustained development impact and poverty reduction. It is the safeguard policies that are at the front line of ADB’s accountability mechanism and compliance review process, since these policies, if properly implemented, help ensure that **third parties do not incur material damage...***” (para 4; emphasis added). The ADB’s over-arching goal of poverty reduction requires that poor and marginalised communities who suffer adverse impacts from ADB projects and programs be clearly recognised as the ADB’s intended beneficiaries. The main function of the Safeguard Policies must therefore be to effectively and consistently protect affected communities and ensure that they benefit rather than suffer from ADB-funded projects and programs.

While the ADB may be experiencing changes in the lending environment in Asia, affected communities on the other hand are experiencing material adverse impacts due to the non-implementation and weakness of safeguards. A boycott statement issued by South Asian NGOs in response to ADB's weak SPU process lists "*fraudulent environmental impact assessments (EIAs) and environmental clearances, suppression of information, and gross violations of human and indigenous people's rights*" as realities communities are experiencing in ADB funded projects. (see: <http://www.bicusa.org/en/Article.3644.aspx>).

Recommendation:

The ADB must ensure that the safeguards policies/SPS in language, content and structure focus on affected people instead of borrowers. The three safeguard policy must be retained with clear, mandatory requirements that prevent harm to affected people. Instead of tying to bow to pressure from borrowers, the ADB should promote strong safeguards as comparative advantage by demonstrating how they contribute to development effectiveness and sustainability both in regard to social and environmental aspects, but also in economic terms.

2. Failure to improve clarity, coherence and consistency

One of the main reasons the SPS draft fails to provide the required protection for affected people and the environment is the vagueness of its language and structure. The SPS contains different components, some of them as appendices, and it is unclear which (and when) components are mandatory and how they relate to each other. Section V. A of the SPS, for instance, is titled "draft safeguard policy statement". It contains objectives, scope and policy principles for each of the three policies and states that "*the policies apply to all projects funded by a loan, and/or a grant, and/or other means such as equity and/or guarantee (thereafter referred to as projects).*" (para 40) It is unclear what "*the policies*" refers to. Section V lists that ADB's three safeguards are, : (i) the Policy on Environmental Safeguards, (ii) Policy on Involuntary Resettlement Safeguards and (iii) Policy on Indigenous Peoples Safeguards. However, the SPS contains no sections called "Policy on Environmental Safeguards"; but instead a one page section for each of the three safeguard areas called "Objectives, Scope and Policy Principles" of the respective safeguard area. The SPS further dilutes any binding nature of policy requirements by using language such as "the achievement of safeguard policy objectives" (para 26) and "the achievement of ADB policy principles" (para 57) rather than referring to policy compliance.

Section C of the safeguard policy statement refers to general and specific requirements but at the same time exempts sector lending modalities, multi-tranche financing facility projects, and other lending modalities where subprojects or project components are prepared after Board approval. Paragraph 52 states that "*where appropriate, the framework approach may apply where the project or project component is subject to detailed design after Board approval*". When and whether it is appropriate for the ADB to use the framework approach is for the Bank to determine itself. Paragraph 52 does contain the caveat that "*The framework approach is not appropriate for highly complex and sensitive projects*". However, the definition of "*highly complex and sensitive projects*" as "*those deemed by ADB to have significant complex, multi-dimensional and generally inter-related potential social or environmental impacts*" (para 50) is in itself subject to interpretation. Similarly, when a 'country safeguard system' is implemented, the ADB need only assure itself of 'equivalency' between country laws and the policy principles of the SPS – all requirements under the SPS are functionally discarded. Such confusions as to which, and when, components of the SPS are mandatory can only serve to increase confusion in project level implementation, and weaken oversight.

The SPS is suggesting a fundamental change to the way the Bank structures and manages its approach to safeguard standards. Yet, the SPS leaves essential components of implementation and operation to future processes (such as at W-paper stage) with lower levels of opportunity for

consultation or comment by those external to the ADB. Given the importance of improving the ADB's performance in implementation, resourcing and monitoring of the safeguards – all key aspects identified in the Special Evaluation Studies undertaken by the bank as part of the SPU – the lack of detail and clarity on Bank approach to this renders the SPS draft in a very vague light as to how 'workable' it actually could be. (for example see paras 63, 65 on resourcing). The other aspect of concern with the fundamental changes is the absence of detailed proposals for how the new policy principle approach will work under the Bank's Accountability Mechanism, which requires all Bank policies and the OMs to be inspectable.

Recommendation;

The SPS should contain clear sections on mandatory requirements that are not exempted through caveats in other sections of the text. The SPS should clearly state which components are mandatory and when, and explain how the different components relate to each other.

3. Lack of clarity on operationalisation

One of the criticisms of the existing safeguard policies is that staff and implementing agencies find it hard to operationalise them because of lack of clear directions. This is understandable, as the three safeguard policies all date back to different drafting years, and have no consistency among them. Also, it is hard to determine from the policies what is mandatory and what is aspirational. The Operations Manual is supposed to provide guidance to staff on how to implement policies. In September 2006, the ADB revised the Operation Manual Sections for the three safeguards policies. This revision constituted somewhat of an improvement of the old OM Sections, but scope for further strengthening remains. Rather than working towards that goal, it is fair to say that the SPS draft almost completely removes those clear mandatory requirements of the existing safeguard policies.

One such example is the removal of the 120-day rule in the existing Environment Policy which determines that Summary Environmental Impact Assessment (SEIAs) for projects with environmental category A and Summary Initial Environmental Evaluations (SIEEs) for projects with environmental category B must be disclosed and posted on the ADB's website at least 120 days before scheduled Board approval. The current SPS draft merely states that "*the consultation should be carried out as early as possible in the project cycle ...*" (Attachment A, para 12) and does not stipulate a timeline for the release of SEIAs and SIEEs.

In regard to the Involuntary Resettlement Policy and Indigenous Peoples Policy, the SPS recommends that the categorization on scale of impact be dropped. This categorization system for scale of impact in regard to resettlement, again is one of the few requirements that is clear in the existing policy which states that Category A with significant impacts means 200 people or more will be affected by physical displacement or loss of more than 10 % of productive assets. (OM Section F2/OP, para 19). These kinds of provisions give staff and borrowing governments clear guidance and provide protection of affected people. What is needed in order to enhance the existing safeguard policies, is to clarify the categories for environmental impact and impact on indigenous people in a similar manner, as currently the policies do not provide definitions for "significant" and "less significant". The SPS moves in the opposite direction by calling for abandoning the categorization system for the Environment Policy and Indigenous Peoples Policy.

One major flaw in the SPU process is that the Operations Manual sections that are to accompany the final revised Safeguard Policy Statement are not provided for comment and consultation at the same time as the SPS draft. It is possible that the ADB Management considers the Operations Manual Sections as internal documents. However, the SPU team and ADB senior staff have from the beginning of the process emphasized that one of the key purposes of the SPU is to make operationalisation of the policies more feasible and efficient. In light of this, the OM

sections constitute a key cornerstone of the revisions, and it is not acceptable that they are developed internally.

Recommendation:

The ADB should make public the drafts of the Operations Manual sections for the three safeguard policies and include this draft as basis for consultation.

4. Weak requirements regarding consultation

The provisions regarding consultation in the draft SPS are equally weak. The text picks up a word game that the ADB has been playing for a while in order to avoid having to really take the views of affected people into account and **make according changes to decisions and project designs**. The draft SPS states that the borrower/client should “*carry out free, prior and informed consultation*” (para 12). This phrasing is a variation of the concept of free prior informed **consent** (FPIC) which was for the first time formalized in the World Commission on Dams Recommendations and also constitutes the cornerstone of the United Nations Declaration on the Rights of Indigenous Peoples which was adopted by the UN General Assembly in September 2007.

Free prior informed **consent** means exactly that: affected people have to give or withhold consent to any projects and/or decisions that will affect their lives, livelihoods, lands and territories, and that such a decision will be made according to traditional decision making processes, with sufficient information provided regarding consequences both positive and negative and that the decision is made free from coercion. The ADB’s substitution of consultation for consent renders the concept of FPIC meaningless as it allows the Bank and implementing agencies to go ahead with a project as long as consultations have been held, in some instances even if at these consultations affected people may have expressed strong disagreement. In regard to involuntary resettlement, the SPS draft states that “*in the case of negotiated settlements involving economic or physical displacements, procedures will be developed in a transparent, consistent and equitable manner ..., which meet the objectives of this policy principle*”. However, the SPS does not determine in which cases the ADB/implementing agency is required to set up a negotiated process. In regard to the Indigenous Peoples Policy, the SPS draft refers to the need to ensure that there is “*broad support*” (para 26) but does not detail how such support is measured or intended to be achieved. The same paragraph does refer to the UN Declaration on the Rights of Indigenous People, but merely says that the issue of free prior informed consent will be “*further discussed*”. Notable in this regard is the removal of the reference to consent contained in the 1998 Policy on Indigenous Peoples, despite the UN Declaration on the Rights of Indigenous Peoples being passed by the General Assembly *prior to* the release of the 2007 SPS Draft.

In regard to consultations on projects it is worth noting that the ADB’s current practices lack transparency. Due to civil society pressure, the ADB has generally improved its process and transparency around policy consultations, and in some cases we have seen substantial improvement in policy as a result. Policy revision processes tend to be high profile and receive much attention from national, regional and international NGOs. Project consultations on the other hand, happen with hardly any public oversight. We have evidenced this in cases where we and partner organizations have written to the ADB requesting records from project consultations, but did not receive any of these records, raising the question whether they exist in the first place.

Recommendation:

The SPS should require free, prior, informed consent in line with international best practices. The ADB should keep records of all project consultations and post them on its website in English and the language in which the consultations were held.

5. Lack of harmonization

One of the ADB's stated intentions for the SPU was also to harmonize its safeguard policies with those of other multi-lateral financial institutions. However, it appears that the ADB is being selective in what aspects it chooses to align with other multi-lateral financing institutions. (MFIs). The World Bank, for instance, has 10 discrete safeguard policies. The ADB is remaining with its three policies and has chosen to integrate them and reduce them to principles, an approach which is singular among the MFIs. The ADB has also disregarded the strengths of other public multilateral finance institutions' policies, such as the Inter American Development Bank, in requirements for adherence to international law, aligning itself primarily with the International Finance Corporation's standards for private finance.

Recommendation:

The SPS should be consistent in harmonizing with other MFIs and not just select certain aspects to which ADB safeguards will be aligned.

6. Approach to Country Systems

We believe that the intended move towards country systems as outlined in the draft SPS is premature and risks seriously undermining the safeguard policies. While Oxfam supports the goal of increasing borrowing countries' capacity and ownership of safeguards, and in particular to strengthening and developing national laws to protect the peoples and the environment of Asia Pacific, we are concerned that the country systems approach alone will not lead to these outcomes. The strengthening and development of national laws, however, is a separate issue than the ADB's own responsibility to mitigate and avoid harm in its projects. One cannot be subsumed to the other. For a detailed analysis of the problems around the proposed country system approach, please refer to "An Evaluation of the Asian Development Bank's Approach to "Country Safeguard Systems" prepared by the Center for International Environmental Law, November 23, 2007 Draft. This paper can be found at <http://www.bicusa.org/en/Article.2851.aspx>

Recommendation:

The ADB should proceed with extreme caution in regard to country systems and at the very minimum set up a testing phase. In addition, the ADB should take lessons from the WB pilot on CSS the results of which were highly unsatisfactory.

7. Weaker individual safeguards

As stated above, this analysis only refers to the broader concerns around the draft SPS. At the same time, we believe that the sections on the individual safeguards in the SPS draft, including the Attachments A – C fall seriously short of clear, strong, implementable safeguard provisions. For detailed analyses and recommendations, please see the following papers which can be found at the same link above:

" Preliminary Notes on the ADB's October 2007 Consultation Draft Safeguard Policy Statement with a Focus on Environmental Safeguards", Stephanie Fried, Ph.D., Environmental Defense, November 2007

"Talking Points on Involuntary Resettlement (IR)", *Based on preliminary analysis of the IR components of the SPS Consultation Draft1*, Joanna Levitt, International Accountability Project November 2007

“Preliminary Analysis – IP Section of ADB SPS Draft”, Helen Leake, Forest Peoples’ Programme, November 2007

Conclusion

The October 2007 SPS draft represents a weakening of the existing safeguard policies, and even of stated intentions as outlined in the 2005 Discussion Note. In addition, the SPS draft is a complete overhaul of the content, language and structure of the existing safeguard policies. In light of this, we believe that it is deceptive to refer to the ongoing process on the safeguards policy as an “update”. Other policy redrafting process in the ADB in the past have been referred to as “reviews”. We believe it would be consistent for the ADB to refer to this process as review as well and not try to obscure the intention to introduce full-scale changes.

Given that the 2007 SPS draft rolls back commitments made by ADB Management and by the 2005 Discussion note, we believe outcomes from consultation based on this draft will not result in strengthened policies. We call for the retention and improvement of the three specific policies with mandatory requirements as outlined in our submission to the ADB “Safeguarding or Disregarding” (see footnote 1). We request that the ADB rewrite the October 2007 SPS draft in a manner that lives up to the promise not to dilute the safeguards and moves towards a draft which truly enhances the coherence, clarity and internal consistency of the existing safeguard policies. Once the ADB has undertaken this revision, it should then ensure a meaningful consultation process as promised to CSOs, governments and other stakeholders. If the ADB takes this opportunity to be a leader in the development of safeguard systems and produces a consultation draft and process that accurately reflects international law and standards, we stand ready to engage in such a meaningful process.

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