



11 January 2008

Mr. Nessim Ahmad, Director Environment and Social Safeguards
Ms. Xiaoying Ma, Senior Environment Specialist / SPU Team Leader
Asian Development Bank
6 ADB Avenue, Mandaluyong City 1550
Metro Manila,
Philippines

Re: Call for a Suspension in Consultations on draft Safeguard Policy Update

Dear Nessim and Xiaoying,

The Bank Information Center (BIC) has been closely following the review of the ADB's Safeguards Policies since the review was first announced in August 2005. BIC fully supports the ADB's goal of strengthening its policy framework to "promote the sustainability of project outcomes by protecting the environment and people from potential adverse impacts of projects." Towards this end, we believe that it is essential for the ADB to develop a robust set of Safeguard Policies to ensure that the adverse impacts of its projects do not fall disproportionately on the poor or marginalized, that the environment is not degraded in the process and that natural resources are managed sustainably.

We have engaged in good faith with the Safeguard Policy Update (SPU) and have spent a considerable amount of time and resources over the past two years working both with the ADB staff responsible for the revisions and NGOs interested in ensuring that the ADB adopts acceptable standards.

However, we believe that the October 2007 Consultation Draft of the Safeguard Policy Statement (SPS) does not reflect the ADB's commitment "not to dilute the policies but instead to focus on delivery" (ADB statement made during SPU panel discussion at the Kyoto 2007 AGM, see <http://www.bicusa.org/en/Article.3354.aspx> for audio recording).

Unfortunately the draft SPS does dilute existing ADB safeguard policies in many critical areas and will fall far short in ensuring the sustainability of ADB-financed operations. We find that the SPS does not upwardly harmonize with policies of other IFIs (with the IFC in particular, after which the SPS is modeled), and its requirements do not meet many relevant international law and best practice standards. The draft replaces the ADB's detailed and currently mandatory environmental safeguards with one page of mandatory general "policy principles" which in many instances are much weaker than existing requirements and subject to wide interpretation. There are also numerous gaps between the policy principles and corresponding implementation requirements for borrowers and clients. An overview of concerns is attached and several NGO analyses are posted at <http://www.bicusa.org/en/Article.2851.aspx>.

In addition to dilution of safeguard provisions, we are concerned about the proposed "Framework Approach" which would exempt certain classes of operations from full safeguard policy review, such as sectoral loans and Multi-tranche Finance Facilities (MFFs) in which subprojects or project components are prepared after ADB Board approval. While such an approach may be appropriate for certain repeater projects with no to minimal adverse impacts, we fear that this proposal may turn back the clock in development lending by taking environmental and social mitigation measures out of project design in

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early stages of project formulation, increasing the likelihood of approved projects that may not be socially and environmentally sound.

The Country Safeguard Systems (CSS) approach, as proposed, will also weaken environmental and social standards, particularly in cases in which the “principle” used to implement the CSS approach requires less than the original environmental or social standard upon which the principle is to be based. NGO analysis of the CSS proposal identifies a number of such examples, particularly in relation to the areas of Environmental Management Plans and Involuntary Resettlement (see the “Initial Country Systems Analysis of the SPS” at <http://www.bicusa.org/en/Article.2851.aspx>).

The draft suggests mainstreaming the CSS and MFF approaches. This is alarming given that the CSS RETA 6285 is yet to be completed and its outputs are yet to be shared or discussed with external stakeholders. The MFF is still a pilot initiative whose findings (as per an email from the ADB) will be shared with the Board tentatively in February 2008 when its W-Paper titled “Mainstreaming the Multi-tranche Financing Facility” will be shared with the Board. The fact that both initiatives are included as core elements of the draft SPS when these are still under preparation and public consultation is still pending is a cause for considerable concern.

In light of the substantial critique of the SPS already offered by non-governmental organizations, we propose that the ADB halt its current consultation process and offer a revised draft that addresses key concerns as the basis for further public consultations. We believe that continuing consultations on the current flawed draft would be an inappropriate use of limited time and resources.

While BIC has decided not to participate in consultations on the existing draft, we will look forward to continue our engagement after fundamental improvements are made to the draft SPS.

Sincerely,

Shefali Sharma
South Asia Regional Coordinator, Asia Program

Cc:
NGO Forum on ADB

Overview of BIC Concerns with October 2007 Draft Safeguard Policy Statement¹

I. Indigenous Peoples

Our overall conclusion from careful reading of the SPS is that although the current draft uses careful language, and provides some improved protections in specific areas, *it fails to uphold existing human rights requirements for international finance institutions generally, and specifically in the case of indigenous peoples.* In particular, the protections afforded to the right to give or withhold consent, to obtain and retain recognized rights to customary and traditional lands and resources, and the overall lack of clear guidance on requirements for 'consultation' and 'good faith negotiation' mean that the policy statement and operational requirements fail to provide the minimum protections required under international law.

We would also like to point out that in September 2007 the United Nations General Assembly passed the Declaration on the Rights of Indigenous Peoples, and **not one** Asian government voted against passing the Declaration. The passage of the Declaration must be taken as a resounding and powerful statement of the aspirations and intentions of Asian governments and peoples for the futures of the indigenous peoples of the region. Therefore we are disappointed that the ADB offers a draft which does not promote international law endorsed by its borrowers; nor does it assist borrowers to operationalize this law.

The draft policy statement currently fails to meet existing standards on safeguard measures for indigenous peoples on a number of key, significant points. These are highlighted below.:

- fails to apply or reference relevant international agreements, legal norms and laws as relevant to the requirements of the policy, in particular the Declaration on the Rights of Indigenous Peoples (2007)
- fails to apply a human rights based approach to development
- fails to ensure that the policy provisions are universally applied across all Bank-supported activities (in particular 'Section E' or 'special requirements')
- fails to protect or recognize the right to free, prior and informed consent in ANY activity impacting on indigenous peoples
- fails to provide protection for customary and traditional tenure in projects involving physical relocation or direct impacts on indigenous peoples' lands, if such tenure is not formally recognized by the state
- fails to ensure that the imposition of Protected Areas can only proceed with the free, prior and informed consent of the affected peoples, in direct contravention of agreements made under the World Parks Congress (Durban 2004)
- fails to prohibit the relocation of indigenous peoples from their traditional lands, territories and resources without their free, prior and informed consent, nor does it prohibit the restriction of access or commercial development of natural resources found on the lands of indigenous peoples
- fails to provide disclosure requirements sufficient to ensure informed decisions can be made, in particular SIA and EIA documents

¹ This overview is taken from the Preliminary Analysis on the October 2007 draft SPS prepared by Forest Peoples Programme, Environmental Defense, International Accountability Project, Gender Action, and Center for International Environmental Law. It must be read in conjunction with the full Preliminary Comments available at the BIC website at <http://www.bicusa.org/en/Article.2851.aspx>

- Lack of established grievance mechanisms for project level redress:

Preliminary Analysis of the IP sections of the draft by Forest Peoples Programme and their allies expand upon the above and this is attached for your reference.

II. Environmental Safeguards

According to the Consultation Draft, the scope of the Safeguard Policy Update (SPU) consists of five areas including “balancing a front-loaded procedural approach with one more focused on results”, “tailor[ing] safeguard approaches to different clients with different capacities”, “making policy implementation more adaptable”. There are substantial concerns that the goal of “balancing a front-loaded approach” may be an attempt to reduce or eliminate clear requirements which are currently necessary prior to project approval/implementation; the “tailoring” of safeguard approaches to “client capacity” and increasing “adaptability” of implementation, may represent a significant move away from recognized international standards

- 1) The October 2007 Draft Safeguards Policy Statement weakens the ADB’s detailed and currently mandatory environmental safeguards and replaces them with one page of mandatory general “policy principles,” much weaker than existing requirements and subject to wide interpretation.
- 2) There is no detailed language in the environment safeguard policy regarding the rights of project-affected peoples who are not Indigenous Peoples and who are not forcibly resettled. There is no commitment to respecting and safeguarding the human rights, livelihoods, habitats, and practices of project-affected peoples, other than Indigenous Peoples
- 3) There are no clear, detailed requirements for the manner in which assessments of social impacts of environmentally sensitive projects will be carried out nor requirements for full participation in decision-making by affected peoples.
- 4) The existing 120 day public comment period has been eliminated. *There is no minimum specified period of public comment at all.* . Policy principles make no detailed requirements for the timing of consultations with project-affected peoples.
- 5) There is no requirement to obtain free, prior, informed consent from project affected peoples. (“Broad community support” and “good faith negotiations” are required for Indigenous Peoples but not for other project-affected local peoples. See comments by H. Leake regarding the lack of clear guidance on “consultation”, “BCS” and “good faith negotiation” in IP policy.)
- 6) There are no clear requirements for the type of “grievance mechanism” available to project-affected communities, or at what stage of the project processing timeline.
- 7) The requirement to document project alternatives has been replaced with requirement to document “technically and financially feasible alternatives”.
- 8) The overall policy continues to be based on the utilization of a flawed analysis and misinterpretation of OED data regarding alleged high “transaction costs” of safeguard policies, the so-called “need” to move away from a “project focus”, and the “necessity” for reconsideration of the current required 120-day disclosure period for environmental and social impact assessment documents prior to project approval; The raw data from the OED do not support these interpretations or approaches

9) There is an alarming move towards a “Framework” Approach and Multi-tranche Finance Facilities which involve approval *en masse* of multiple tranches at once. These approaches appear to be an end-run around the public consultation process and careful assessment of environmental and social impacts *prior to release of project finance*. This approach would greatly reduce the ability for leveraged implementation of safeguards at each stage of project finance.

10) Weakening of requirements for financial intermediaries – Elimination of ADB review of subprojects, “self-reporting” by financial intermediaries;

11) Elimination of language pertaining to ADB requirements and ADB oversight from “General Requirements: Environmental Assessment”;

12) Lack of data in draft SPS renders meaningful comment difficult on the following:

* No information provided regarding proposed safeguard implementation budget costs; This is a core part of the documentations necessary for meaningful consultation. It is difficult to comment in a meaningful manner on the new proposed framework without seeing proposed budget numbers.

* Missing documents included documents referenced in various Consultation drafts (July, October) but not provided for public scrutiny: “relevant operational manuals”; “Annex I” which is stated to contain further details regarding the elements of an EIA report

13) Concern regarding elimination water, fisheries, energy and forestry safeguard policies: The ADB has indicated that the new Safeguard Policy will not only replace the Environment, Involuntary Resettlement, and Indigenous Peoples Safeguards, but also the Forestry, Water, Fisheries and Energy Safeguards. We have not had time to assess the content of the water, fisheries, energy and forestry safeguard policies and are concerned that the protective measures of these safeguards will be eliminated. There is a need for further analysis of these policies

Preliminary Analysis of the Environmental Safeguards sections of the draft SPS by Environmental Defense expands upon the above and this is attached for your reference

III. Involuntary Resettlement

While the SPS Consultation Draft represents some improvements, there **remain significant weaknesses** in the language that raise concern.

i. Lack of human rights approach

- While there is occasional mention of rights, overall, the language throughout the SPS **fails to reflect a human rights- centered approach**, as would be consistent with international best practice:

The ground-breaking decision-making framework based on ‘recognition of rights’ and ‘assessment of risks’ (particularly rights at risk) proposed by the World Commission on Dam (WCD) is widely considered to represent best international practice for development decision-making. We strongly urge the ADB—particularly given the ADB’s status as a former Financial Contributor and Forum member of the WCD—to ensure that all updated safeguard policies adhere to this framework.

ii. Country Systems and Involuntary Resettlement

- **Involuntary resettlement is an area of particular concern in terms of shifting to country systems.** In the Asia Pacific region, very few countries, if any, have adequate frameworks and capacity to effectively guarantee protection of the rights and development interests of people who might be affected by involuntary resettlement.

iii. SPS Objectives

We are pleased to see that *avoidance of resettlement* and *improvement of affected people's livelihoods* are core objectives, in *Objectives, Scope and Policy Principles on the Involuntary Resettlement Safeguards* (p. 15). However, these statements need to be strengthened in the following ways:

1. The current statement on avoidance is inadequate. It states: "Avoid involuntary resettlement wherever feasible, and minimize involuntary resettlement through assessing project alternatives and alternative project designs." It needs to be revised and enhanced to include additional language on the following key points:

Involuntary resettlement involves enormous risks of impoverishment and human rights violations, and must be avoided. If avoidance proves to be unfeasible, minimize resettlement through assessing project alternatives and alternative project designs. **In every case, the alternative to refrain from carrying out the project (the "non-action" alternative) should be seriously considered, particularly if negative impacts on affected people will be severe."**

2. The current statement on "enhancing or at least restoring" livelihoods needs to be strengthened by including language on:

All projects involving involuntary resettlement must provide sufficient investment resources and opportunities for resettlers to **share in project benefits. Ensuring equitable benefit-sharing systems, developed in close consultation with affected people, should thus be included as a policy objective,** rather than simply as a possibility among the policy principles, as it is currently framed in the draft SPS.

3. A third objective needs to be added that states: **Ensure that affected people are able to actively participate in and shape the projects that affect them, the associated resettlement activities and benefit-sharing schemes.**

The issues of meaningful participation and consultation must be seen as inherent to planning for involuntary resettlement. If projects are going to displace people—to force affected people to make this great sacrifice—these projects absolutely must respond to genuine and significant development needs of the region, as identified by local people themselves. **Achieving meaningful participation must be included as a core objective.**

iv. Scope of IR Policy

The SPS reduces the scope of involuntary resettlement to a focus on land acquisition. It creates a problematic overlap between Involuntary Resettlement vs. Environmental Assessment; There is a lack of due process for affected people who fall outside this new limited scope of IR

The following paragraph raises significant concerns (para. 9 from p. 14 of *Attachment B: Safeguard Requirements for Borrowers/Clients: Involuntary Resettlement*):

In the event of potential adverse economic, social or environmental impacts from project activities other than land acquisition (e.g., loss of access to assets or resources or restrictions on land use), these impacts will be avoided, minimized, mitigated or compensated for **through the environmental assessment process.** If these impacts are found significantly adverse at any stage of the project, the borrower/client will consider applying the policy principles and safeguard requirements on involuntary resettlement, even where no initial land acquisition was involved.

This paragraph raises concerns for a number of reasons:

- It will create confusion among ADB staff, implementing agencies and affected people as to which policy should be triggered.
- International best practice, including policies of ADB’s peer institutions, recognizes that involuntary resettlement covers a much broader range of activities beyond land acquisition.
- By allowing the borrower/client to decide whether or not to apply involuntary resettlement policy principles and requirement, this creates a dangerous reliance on the arbitrary discretion of the borrower/client—who may have a direct conflict of interest in applying the involuntary resettlement policy, if it’s going to be more expensive. This thus puts affected people at risk of “falling through the cracks” and not being covered by any of the policies.
- **Most importantly, for non-indigenous project-affected people who lose access to natural resources, lands and waterways caused by project activities other than direct land acquisition, they are now left without strong provisions to ensure due process, participation, compensation or full entitlements.** The new scope limited to land acquisition will **unfairly exclude a vast proportion of economically and physically displaced people from entitlements under the IR policy.** The above paragraph says they will be covered by the Environment section of the draft SPS, but that will not be of much worth to these affected peoples, because the Environment policy principles have been drastically weakened, and lack robust provisions for management, mitigation and compensation of **social** impacts. The Indigenous Peoples section has some strong provisions on participation and rights protection, but these will not be triggered for non-indigenous affected groups. **This irresponsible and unjust reduction in scope must be corrected.**
- To ensure that the all impacts and losses are accounted for, a fourth cause of displacement should be added to the section on Scope: **(iv) change in the use of land.** This is a critical additional category to complement the currently-listed causes of “involuntary acquisition of land” and “involuntary restriction on land use.” Change in land use can cause physical and economic displacement impacts. It was included in the old policy, and we strongly recommend its reincorporation into the new SPS.

v. Entitlements for non-titled affected people

The draft SPS currently discriminates against affected people without legally recognizable title to land. While it affords such groups a number of important entitlements—including provision of adequate housing with security of tenure, and compensation for the loss of assets other than land, such as dwellings and other improvements to the land, at full replacement cost—it **fails to require that such people are compensated for loss of land**, or provided with replacement land.

IV. Use of Country Safeguard Systems

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 framework² - 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

² 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.”

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 2005.³

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 equivalency and acceptability and to filling gaps. In other words, the World Bank has assessed equivalency and acceptability *for each* pilot project and has required each country to fill only the gaps that are relevant for a given project.

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.

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 and after the ADB completes and comprehensively discuss the outputs expected from ADB RETA 6285.
- 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

³ 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.

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.

V. Gender Analysis

The ADB Gender Policy and good practice require that all ADB operations address gender issues. Yet the Consultation Draft of the ADB's Safeguard Policy Statement (SPS) almost entirely fails to integrate gender concerns including safeguard elements of the ADB gender policy. Gender concerns aside, the SPS social safeguards are alarmingly weak, particularly for non-indigenous women and men who have not been resettled. Protections for indigenous women and men as well as people who are involuntarily resettled are also extremely weak and must be strengthened.

The SPS does not sufficiently facilitate women's participation in ADB operations, and it neglects to provide adequate protections to ensure that ADB projects and programs do not contribute to gender inequality and the marginalization of women. Specifically:

- The SPS review of "Current Safeguard Policies and Experience" and "Identification of Safeguard Elements in Other Policies and Procedures" do not mention gender or BP/OP C2 at all, despite the Safeguard Policy Update Discussion Note mention of the need to include safeguard elements of the ADB's gender policy.⁴ This is a stark omission, particularly since a recent internal ADB review found that projects with well-designed GAPs help produce better project results for women, and achieve overall project objectives.⁵
- Environmental Safeguards: The SPS does not mention any gender issues in the policy on Environmental Safeguards, despite many women's key role as custodians of the environment and many poor women's reliance on natural resources to provide household goods such as water and firewood. More broadly, the policy on Environmental Standards almost entirely neglects to account for the social impacts of environmental degradation. It is unclear if ADB even plans to require a rigorous social impact assessment for any environmental category of projects that does not involve resettlement or indigenous peoples.

⁴ Page 9. ADB. October 2005. Safeguard Policy Update: A Discussion Note. <http://www.adb.org/Documents/Policies/Safeguards/discussion-note.pdf>.

⁵ Hunt, Juliet; Shireen Lateef, and Helen T. Thomas. September 2007. Gender Action Plans and Gender Equality Results: Rapid Gender Assessments of ADB Projects. Synthesis Report. ADB. <http://www.adb.org/Documents/Reports/RGA-Synthesis-Report/RGA-Synthesis-Report.pdf>.

- Involuntary Resettlement (IR) Safeguards: The SPS policy principles on IR include gender disaggregated social impact assessments.⁶ Yet the IR Safeguard Requirements for Borrowers/Clients section that expands on the policy principles simply suggests that the client's social impact assessment include a gender-disaggregated description of the conditions of affected peoples.
- Indigenous Peoples (IP) Safeguards: The IP Safeguards policy principles mention that social assessments should identify social and economic project benefits that are gender inclusive. Yet the IP Safeguard Requirements for Borrowers/Clients simply requires that clients "give special attention" to the concerns of indigenous women during project consultations.
- None of the SPS Safeguards require borrowers/clients meaningfully consult with men *and women*, take gender issues into consideration during project assessment, address gender concerns identified in project design and implementation, or monitor projects for gendered results.

⁶ Page 15. ADB. 25 September 2006. Gender & Development in ADB Operations. OM Section C2/BP. http://www.adb.org/documents/manuals/operations/OMC02_25sep06.pdf.