



February 19<sup>th</sup>, 2008

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## **CONCERNS REGARDING THE ADB'S DRAFT SAFEGUARD POLICY STATEMENT**

*Submitted by International Accountability Project*  
**19 February 2008**

Dear Mr. Ahmad and SPU team,

The International Accountability Project (IAP) is writing to submit our recommendations regarding the October 2007 Consultation Draft of the Safeguard Policy Statement (SPS), and express our concern, in particular, with the components related to involuntary resettlement. Our analysis finds that the draft SPS represents a dramatic weakening of the existing ADB Safeguard policy requirements and provisions. This back-sliding violates ADB's publicly stated commitment not to dilute the Safeguards. IAP, along with hundreds of other civil society organizations, has decided not participate in face-to-face consultations on the basis of the current draft SPS. ADB should prepare a revised draft SPS document, which strengthens existing safeguard provisions and reflects international best practices. Such a document would be an appropriate basis for face-to-face consultations.

IAP has been actively engaged in the SPU process for over a year, and we have submitted detailed recommendations and analyses on strengthening ADB's policy and practice on involuntary resettlement. ADB's involuntary resettlement policy is critically important to millions of people across Asia. We have a strong interest in continuing to promote the improvement of this policy. The ADB should revise the draft SPS and take this opportunity to emerge as a leader in designing and implementing world-class safeguard systems.

The attached comments are intended to be read along with the earlier submissions made by IAP on involuntary resettlement (*attached; also available at [www.accountabilityproject.org](http://www.accountabilityproject.org)*), as well as with recent comments submitted by many of our peer organizations, including NGO Forum on ADB, Bank Information Center, Oxfam Australia, Environmental Defense Fund, Center for International Environmental Law, Gender Action, and Forest Peoples Programme.

Sincerely,

Joanna Levitt, Co-Director  
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## I. Introduction

The ADB's policy on involuntary resettlement is critically important to millions of people across Asia. It is well established that involuntary resettlement leads to impoverishment of affected people unless comprehensive measures are taken to ensure otherwise. **The ADB, as a public institution with a mandate to promote poverty alleviation, must ensure that its lending activities do not result in 'involuntary impoverishment' of the vulnerable populations that its projects displace.** It is thus essential that the ADB establish robust safeguard policies that effectively prevent impoverishment. Our analysis finds that the draft SPS represents a dramatic weakening of key provisions of the existing ADB Policy on involuntary resettlement. This weakening is unacceptable, as it endangers displaced people with greater risks of life-threatening impoverishment.

The provisions of the October 2007 Consultation Draft are also weaker than those included in *earlier drafts* of the SPS. Such regression suggests a lack of good faith on the part of ADB management to ensure that ADB projects not only *do no harm*, but also *benefit*, those

people displaced by ADB projects. The draft SPS fails to ensure that projects are designed to promote poverty alleviation, democratic decision-making processes, and respect for human rights.

Finally, the protections provided in the current draft are **below international standards established by peer lending institutions and other international agencies.**<sup>1</sup> ADB should aspire to be a leader among development institutions in formulating and implementing international best practices. Donor harmonization of safeguards should not result in a global race to the bottom in terms of who has the least onerous constraints for ensuring social and environmental sustainability. Rather, the ADB should take this opportunity to lead the way in raising awareness of the importance of strong safeguards, and, in doing so, encourage and inspire other funders to raise their standards as well.

Over the past few decades, many development institutions, including the ADB and the World Bank, learned the hard way that avoiding safeguard planning and implementation upstream in the project cycle simply resulted in dramatically increased costs down the road, when social unrest, increased poverty, or environmental damage had to be mitigated. Institutional reputations also suffer due to failed projects. Indeed, it was the urgent need for enhanced development effectiveness, plus a reputational crisis as an institution, that initially motivated the World Bank Board of Directors to push for the systematic adoption of safeguard policies. Today, in addition to the multilateral development banks, a growing number of major commercial banks (currently over 40) have adopted the **Equator Principles**, as these corporations recognize that safeguarding the ‘triple bottom line’ (people, planet and profits) is in fact the most effective way to protect their long-term returns.

There is no reason the ADB cannot simultaneously strengthen its standards *and* make itself more competitive and attractive as a lender; it is false and irresponsible to create an either-or tension between these two goals. **The ADB can ‘market’ its expertise and commitment to genuine sustainable development as a comparative advantage.** ADB leadership must remind staff and potential borrowers that safeguard policies were adopted because they make social *and* economic sense in the long term, and that prioritizing such safeguards is a wise investment.

The ADB risks losing its value-added and relevance as an institution if it does not address the serious weaknesses in the draft SPS and establish much stronger safeguard systems. Weakening protections for local people and the environment is not an acceptable response to the changing scenario of development finance. We challenge the ADB to do better.

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<sup>1</sup> In these comments, best practice and international standards for involuntary resettlement are drawn primarily from the following sources:

- World Bank Safeguard Policy on Involuntary Resettlement;
- IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement;
- Inter-American Development Bank Safeguard Policy on Involuntary Resettlement;
- African Development Bank Involuntary Resettlement Policy;
- The OECD’s *Guidelines for Aid Agencies on Involuntary Resettlement and Displacement in Development Projects*;
- The Report of the World Commission on Dams: *Dams and Development*;
- *Comprehensive Human Rights Guidelines On Development-Based Displacement*, adopted by the UN Expert Seminar on the Practice of Forced Evictions and
- The *Basic principles and guidelines on development-based evictions and displacement* developed by UN Special Rapporteur on the right to adequate housing, Miloon Kothari.

## II. Analysis of major dilutions in Involuntary Resettlement provisions

This analysis highlights the major high-level concerns with the involuntary resettlement components of the draft SPS. Among the many substantive flaws in the Consultation Draft that will endanger the rights and wellbeing of people displaced by ADB-financed projects, the following four shortcomings are particularly salient:

### A. Reduced Scope

First and foremost, the draft SPS reduces the scope of the resettlement policy to exclude a wide range of displaced people that will suffer adverse impacts from ADB-financed projects. This reduction in scope is a step backwards from ADB's current resettlement policy and falls short of widely recognized international standards. Specifically, the SPS :

- **Narrows the definition of who is considered “displaced” and therefore in need of necessary safeguard protections.** The draft strikes from the previous policy those groups of affected people who are displaced by “*changes in land use*” and “*restricted access to natural resources*,” and replaces these widely-accepted definitions with a narrower category of people who suffer from “*involuntary restriction on land use*” and “*involuntary restriction of access to legally designated parks and protected areas*.”<sup>2</sup> **Thus, the SPS entirely removes the category “changes in land use,” and replaces the category “restricted access to natural resources” with the much narrower “involuntary restriction of access to legally designated parks and protected areas.”** As a result, many displaced people who will lose access to lands, resources and livelihood sources due to project-related impacts will be excluded from ADB protection. This limited scope falls far below international best practice on involuntary resettlement, which requires that any persons physically or economically displaced by project-related activities and impacts be covered under involuntary resettlement safeguard entitlements.<sup>3</sup>
- **Excludes all people displaced by the wide range of project-related activities beyond direct land acquisition.** The draft resettlement policy shifts responsibility for a wide array of involuntary resettlement impacts to be covered by the Environmental components of the SPS (e.g. “[A]dverse economic, social or environmental impacts from project activities other than land acquisition” will be covered “through the environmental assessment process.”<sup>4</sup>) Such shifting is inappropriate and irresponsible. As a general matter, environmental policies are not designed to protect against the unique risks associated with involuntary resettlement. In the case of the specific Environmental components of the draft SPS, there is no mention of the social procedures and protections needed to ensure that affected people’s rights and livelihoods are upheld and improved, respectively. This surprising new exclusion of entire categories of affected peoples from the resettlement policy, and the lack of appropriate coverage for such affected people under the environment policy, dramatically heightens the risk of institutional neglect of displaced people and hampers efforts to ensure ADB accountability.
- **Imposes the unneeded qualifier “involuntary” before key policy triggers** (e.g., “*involuntary acquisition of land*” and “*involuntary restriction of access*”<sup>5</sup>) and **fails to**

<sup>2</sup> Consultation Draft of the Safeguard Policy Statement, p. 15, under “Scope”.

<sup>3</sup> World Commission on Dams, final report, at p. 103.

<sup>4</sup> Consultation Draft of the Safeguard Policy Statement, Attachment B, p. 14, para. 9.

<sup>5</sup> Ibid., p. 15, under “Scope”.

**explicitly define “involuntary.”** This acts to create a moral hazard by enabling governments to escape policy requirements through declaring coercive land acquisition and other forms of resettlement as “voluntary,” and deprive displaced people of safeguard protections and entitlements. This **dangerous semantic loophole** has commonly been utilized by governments in countries such as Indonesia where official reports often claim that forest dwelling communities have “voluntarily” given up their forested lands for logging and plantation development, despite the fact that these lands were seized without permission. The ADB should restore the language on scope and triggers used in the existing policy, which does not preface triggers with “involuntary.” Furthermore, in sections of the revised policy in which “involuntary” is utilized, the ADB should follow the lead of peer organizations, such as the World Bank and IFC, which have sought to address the inherent coercion involved in the use of expropriation or other government land use restrictions by **providing explicit definitions for “involuntary.”**<sup>6</sup>

## **B. Weakened provisions for compensation and rehabilitation**

The requirements and specific provisions relating to compensation, rehabilitation, replacement of land and lost assets, and other entitlements owed to affected people have been significantly weakened from the existing ADB policy and previous drafts of the SPS. For example, the SPS Consultation Draft:

- **Eliminates key provisions of the current ADB policy that outline detailed and explicit requirements for restoring access to common property resources** such as forests and grazing lands, public facilities and cultural sites. The new draft contains no meaningful mention of common property resources. Such regression is yet another major step backwards that is inconsistent with current international standards.
- **Fails to state or adequately emphasize that *compensation alone is not enough to improve, or even restore, livelihoods after displacement.*** Instead the new language inappropriately stresses compensation as a *primary* means of rehabilitation and livelihood improvement. It is widely recognized that compensation-based schemes lead to impoverishment. The existing ADB policy, along with those of its peer institutions, explicitly recognizes that compensation should be just one part of a broader package of development assistance measures designed to genuinely rehabilitate affected people, and which factor in their development needs and priorities.<sup>7</sup> The revised SPS should restore and strengthen such language, backed by explicit requirements and guidelines.
- **Removes key requirements for benefit-sharing mechanisms** that were included in the July 2007 version of the draft. This is unacceptable regression, and also fails to incorporate recent findings and best practices in benefit-sharing. As a fundamental

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<sup>6</sup> IFC Performance Standard 5 provides: "*Resettlement is considered involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement. This occurs in cases of (i) lawful expropriation or restrictions on land use based on eminent domain; and ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.*" Similarly, the World Bank policy defines involuntary as "*actions that may be taken without the displaced person's informed consent or power of choice.*" (OP 4.12, footnote 7).

<sup>7</sup> For example, the World Bank Policy on Involuntary Resettlement requires that displaced people are “provided with development assistance in addition to compensation measures, such as land preparation, credit facilities, training, or job opportunities” (OP 4.12, para. 6).

component of international best practice for resettlement programs, benefit sharing must be a central pillar of any resettlement policy. Resettlement specialist Michael Cernea, among other experts, argues that resettlement policy and practice must move away from a focus on compensation and toward an emphasis on benefit-sharing, in order to prevent impoverishment and contribute to meaningful development impact.<sup>8</sup> This issue is addressed in more depth in the following section.

### C. Weakened requirements for meaningful participation

The SPS's draft language on consultation, participation, and communities' rights to free prior informed consent is inadequate and falls far short of standards upheld by the ADB's peer institutions and even provisions set forth in previous SPS drafts. For example, the SPS:

- **Fails to require free prior informed consent of affected communities, or even encourage reaching agreements through negotiated settlements.** These concepts are basic pillars of contemporary best practice on development decision-making (see, e.g., IFC Policy on Social and Environmental Sustainability, World Commission on Dams Final Report). Failure to even mention these concepts demonstrates the retrograde nature of the proposed policy. The Consultation Draft eliminates positive changes presented in the July 2007 version of the draft SPS which included explicit requirements for: meaningful participation in shaping project and resettlement plans; rights to free prior informed consultation and consent; and reaching agreement through negotiated settlements.

### D. Vague, confusing language and lack of measurable criteria

The draft SPS lacks clear, objective and measurable criteria that define the nature of project impacts and the corresponding mitigation measures required to protect displaced people. Without such essential criteria, it will be impossible to ensure accountability and that the client/borrower and ADB comply with policy requirements. Specifically, the draft SPS:

- **Removes clear language on project categorization and reporting requirements for projects causing involuntary resettlement, and replaces these with muddled provisions** that will confuse affected people as well as ADB managers and project implementers. (e.g. “*Resettlement plans will be prepared commensurate with the extent and scale of the impacts*”; and “*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...*”) Rather than offering clarity, such language poses questions about exactly how “extent and scale” of impacts will be determined, who shall make such decisions, in what sequence these assessments will be made during project development, and exactly what impacts must be addressed by specific mitigation measures.
- **Lacks explicit and measurable criteria that will enable effective project oversight and evaluation and ensure institutional accountability.** More specifically, the draft SPS fails to protect against cases in which implementing agencies may have a conflict of

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<sup>8</sup> See: Cernea, Michael, *Financing for Development: Benefit-sharing mechanisms in population resettlement*, ECONOMIC AND POLITICAL WEEKLY, March 2007.

interest against declaring a project’s impacts “significant,” or otherwise upholding the policy objectives and principles.

- **Reporting requirements have been dramatically weakened.** The existing ADB policy contained provisions explicitly requiring, for example:

“To ensure proper and timely implementation of the resettlement plan/framework and adherence to agreed land acquisition and involuntary resettlement covenants, ADB requires, for all involuntary resettlement category A and B projects, that (i) EAs or project sponsors submit quarterly or semiannual progress reports, as deemed necessary by ADB, on implementation of resettlement plans; and (ii) this requirement must be reflected in the loan agreements. Monitoring and evaluation reports are required, preferably from an external monitoring and evaluation agency. These must be reviewed by the resettlement specialist in the operations department that has the responsibility for resettlement supervision, with a copy of the reports and the operations department’s assessment are to be sent to RSES” (ADB Policy on Involuntary Resettlement, p. 14, para. 46).

In the draft SPS, such requirements have been replaced by phrases such as the following: “The borrower/client will prepare periodic progress reports that describe progress with implementation of the RP or equivalent planning document(s), and if any, compliance issues and corrective actions” (SPS Consultation Draft, Attachment B, p. 17, para. 26). Such a statement (“periodic progress reports”) is very difficult to enforce.

This statement is followed by language stating that, for “projects with large-scale involuntary resettlement impacts,” the borrower/client must submit “at minimum, semiannual resettlement progress reports.” However, the draft SPS fails to define how it is to be determined whether a project has “large-scale” impacts, who shall make and verify that determination. Thus, once again, the draft makes compliance unnecessarily difficult to determine and enforce.

The ADB should ensure that the revised policy contains unambiguous, explicit language on reporting requirements and procedures. If the revised policy contains any vague principles or requirements, these should be systematically backed up—in the same way that, for example, the IFC Performance Standards are clarified by the full set of **Guidance Notes**.

**THE VAGUE NATURE OF THE LANGUAGE THROUGHOUT THE ENTIRE DRAFT SPS CONSTITUTES PERHAPS THE SINGLE MOST PROBLEMATIC ASPECT OF THE DOCUMENT.** This issue is further addressed in the final section of these comments.

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<b>III. Missed opportunities for improving resettlement safeguards and outcomes</b>
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**A. Failure to seek input from wide array of experts on involuntary resettlement**

To date, the ADB has received substantive comments only from a handful of NGOs, and has failed to draw upon the large, multi-disciplinary community around the world with expertise on involuntary resettlement issues and best practices. ADB should proactively seek input and guidance from a diversity of academics, NGOs and communities with extensive experience in involuntary resettlement. Such input is necessary in order to design a resettlement policy that truly responds to the lessons learned over the past decades, and which effectively addresses the trends, injustices and challenges of development-induced displacement in the 21<sup>st</sup> century.

In addition to the array of community groups and grassroots organizations across Asia with direct resettlement-related experience, many international organizations could provide input, including, for example: the International Network on Displacement and Resettlement ([www.displacement.net](http://www.displacement.net)); the Oxford Centre for the Study of Forced Migration ([www.forcedmigration.org](http://www.forcedmigration.org)); Christian Aid ([www.christian-aid.org.uk](http://www.christian-aid.org.uk)); Migration Policy Institute ([www.migrationpolicy.org](http://www.migrationpolicy.org)); etc. Such groups could share invaluable input on designing a truly enhanced, world-class Safeguard policy on involuntary resettlement

Following the resignation of core safeguard specialists from the SPU process, the ADB must ensure that *additional qualified experts are brought in to the process of revising that SPS*, and, that the *Board is involved in reviewing* all proposed revised and new Safeguard-related documents. In the wake of the original staff members resigning from the drafting process, we are concerned about who will be drafting the SPS from here on out. It is essential that qualified experts are leading the effort, supported by adequate resources and leadership/management with demonstrated commitment to safeguard objectives and ideals. The process must be fully transparent, and include public and Board review of all components—including any revisions to the Operations Manuals.

## **B. Require livelihood *improvement* across the board**

Over the past two decades, a strong consensus has developed among social scientists, economists, implementing agencies and NGOs that development institutions must abandon an emphasis on *restoration* of incomes, and commit instead to requiring *improvement* in the income, livelihoods and lifestyles of *all* project-affected people. Requiring improvement is essential to shift resettlement practice away from impoverishment and towards development.

(For more in-depth explanation as to why allowing restoration, as opposed to requiring improvement, tends to make a majority of those resettled worse off, see IAP's January 2007 *Comments on the OED Special Evaluation Study on Involuntary Resettlement*, attached and available at [www.accountabilityproject.org](http://www.accountabilityproject.org) ).

The draft SPS requires improvement for poor and vulnerable populations, but renders this requirement effectively meaningless by failing to delineate how such populations will be identified and how improvement will be measured and verified. Furthermore, in a number of sections, the draft includes the phrase, "Improve or at least restore livelihoods of all affected people." Presenting restoration as an acceptable outcome will result in the continued impoverishment of those who are forcibly resettled as a result of ADB-financed projects. **Any mention of mere restoration should be abandoned entirely.** By moving to a clear across-the-board requirement for measurable improvement, the ADB would be applying one of the foremost lessons learned in resettlement over the past decade.

The arguments in favor of improvement rather than restoration were supported by the 1998 World Bank OED review, which criticized the existing World Bank standard (that involuntarily resettled persons should have their standard of living restored, if not improved) as not going far enough towards implementing the purpose of development. (OED Overview, p. 8, 67) The OED said that if the Bank did not place greater emphasis on improving standards of living, it would contribute to the stagnation of the standard of living for resettled populations.

As Dinesh Agrawal and other social scientists have shown, restoration of a previous standard of living has no relevance if resettlement is supposed to be accomplished as a development program. Restoration as a threshold is difficult to define and invites dispute. While

it will require further definition, an improvement standard is easier to gauge and plan for than is restoration. Improvement could require, for instance, that the project provide appropriate health and education programs, adequate sanitation and water supply, access to electricity in the case of power projects, and the provision of other essential public services; an improvement standard would also include respect for cultural values, and the replacement or enhancement of community-based resources, in addition to enhancement of livelihoods.

This standard will truly allow resettlement to be conceived as a development project, consistent with the language of the existing ADB policy. The locally affected people should be consulted early in project design to determine their preferences for how to achieve improvement in the quality of their lives; they should also be included in the assessment of whether such improvement has occurred as a result of the project. Baseline studies must be conducted early in the process, in a participatory and transparent manner.

A policy of improvement should have the added benefit of making the resettlement process less contentious and more acceptable to local communities. This will, in turn, reduce the social tension and friction that comes from involuntary impoverishment. It is also the ethically correct role for a development institution that is forcing people to abandon their known habitats, homes and livelihoods and community structure. The ADB claims to promote the right to development. At the very least, that right should be afforded to the millions of people who are otherwise sacrificed in the name of development.

### **C. Democratize development decision-making; Uphold the right to free prior informed consent**

Ensuring meaningful participation in all project phases—including upstream processes—is a fundamental component of any policy that is consistent with international best practice on development decision-making. Resettlement will not be effective if the affected communities, both resettlers and hosts, are not properly involved in the analysis of alternatives, the design of the project, its implementation, and monitoring. The knowledge base of local people is an asset that has been historically under-valued by ADB “experts.” The resettlement policy should build in procedural mechanisms to require and encourage consultation between Bank staff and project-affected communities at all stages of design and implementation.

The recent ABD OED Study on Involuntary Resettlement found “relatively weak performance on public consultations and disclosure” (p. 24) and also concluded that “[n]o clear guidance is given about the level of public consultation required” (p. 11). This assessment affirms the dire need to dramatically enhance policy and practice on this issue through the SPU process. If a development institution such as the ADB continues to have “weak performance on public consultations and disclosure,” the projects the Bank funds will be undemocratic, uninformed, and unjust. To overcome these weaknesses, and to uphold relevant international law, the revised policy must require that the *free prior informed consent* of affected communities is obtained for any projects causing displacement.

**Free prior informed consent.** Free prior informed consent (FPIC) is an internationally recognized human right and is of particular importance to indigenous and tribal peoples. We would like to point out that the formulation used by the ADB of “free prior informed consultation” is in no way equal to the concept of free prior informed consent, as it has been defined in international law. Free prior informed consent is based on indigenous peoples and affected communities having the right to give *or withhold* their consent for a proposed project, based on access to all relevant information, to communicate this decision through their own

recognized authorities, and to have this final decision respected. FPIC is about equal negotiating power, the right to self-determination, and fundamentally about democratizing development.

This right has recently been enshrined in the UN Declaration on the Rights of Indigenous Peoples. The updated ADB Safeguard policies must be consistent with this principle of international law. Several of the ADB's peer institutions already recognize this right (to varying degrees) for indigenous and tribal peoples. The Inter-American Development Bank requires that affected indigenous people "have given their informed consent to the resettlement and compensation measures."<sup>9</sup> The IFC Performance Standard 7 on Indigenous Peoples, while not officially recognizing the right to free prior informed consent, states that in the case of involuntary "relocation" of indigenous peoples, the project will not proceed unless the "client" (borrower) has reached agreement with the affected indigenous peoples through good faith negotiations: "[t]he client will not proceed with the project unless it enters into a good faith negotiation with the affected communities of Indigenous Peoples, and documents their informed participation and the successful outcome of the negotiation."<sup>10</sup>

Both the World Commission on Dams final report and the final report of the World Bank Extractive Industries Review call for recognition and implementation of the right of communities to FPIC, both as a principle of international law, and as a means to ensure their genuine participation in decision-making processes and securing their long-term benefits. The ADB should commit to upholding this fundamental human right in project planning and decision-making.

#### **D. Include explicit provisions for equitable benefit-sharing**

The draft SPS has almost no mention of benefit-sharing, and lacks any explicit requirements or guidelines for the establishment of equitable benefit-sharing mechanisms. This omission constitutes a failure to incorporate a major lesson learned in recent studies on resettlement and best practices. For example, from the forthcoming book *Can Compensation Prevent Impoverishment? Reforming Resettlement through Investments and Benefit-Sharing*, edited by Michael Cernea and Hari Mohan Mathur (2008, Oxford University Press):

This volume contributes significantly to the international public debate on development-caused displacement and resettlement. It rejects the long-held thesis that compensation is in itself enough to restore and improve the livelihoods disrupted by displacement. Instead, the authors of this volume, a group of the world's best known resettlement scholars — sociologists, anthropologists, economists, ecologists and legal experts — recommend changing displacement policies, laws and practices, by adding investment financing and ex-post benefit-sharing to full compensation. This book comes at a time when those displaced are increasingly opposing impoverishment by forced displacement. Their voices, argue the authors, speak of basic needs and human rights, and must be heard.

This passage makes glaringly clear the fact that the draft SPS—by failing to meaningfully incorporate provisions on benefit-sharing, and regressing to an increased reliance on monetary compensation—is far behind current understanding and best practices on designing rights-respecting resettlement paradigms.

Furthermore, this underscores the earlier point that ADB is failing to draw upon the expertise of the global community of scholars and practitioners working to advance more just

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<sup>9</sup> IDB Operational Policy OP-710 on Involuntary Resettlement, pp. 2-3, section IV.4

<sup>10</sup> IFC Performance Standard 7 on Indigenous Peoples, para. 14

models for remedying development-caused displacement. The revised policy should strongly reflect the new consensus around the importance of benefit-sharing arrangements, arrived at through negotiated settlements and respect for the right to FPIC.

All entitlements and benefits **should be applied equally to all affected people**, regardless of whether or not they have legal/legalizable title to land. A policy that discriminates against non-titled APs will compromise the true sustainability of the project and inevitably lead to unnecessary and increased impoverishment and strife among affected people. In accordance with international best practice on the protection of vulnerable groups and the human rights principles of equality and non-discrimination, the ADB should reaffirm its commitment to ensuring that affected people without legal or legalizable title to land living in the project-affected area are guaranteed equal entitlements in compensation and rehabilitation measures.

**E. Require achievement of rehabilitation milestones before allowing initiation of civil works**

The ADB should take financial responsibility for resettlement as part of the main investment project, and *require that disbursements and/or awarding of civil works may only go forward after agreed-upon rehabilitation milestones have been achieved and independently verified*. This is essential to create an appropriate incentive structure for clients/borrowers and ADB, which will facilitate the prioritization and timely achievement of resettlement and rehabilitation objectives. Too often, social and environmental mitigation lags far behind the completion of the civil works. When there is little money left in the project, problem-solving and leverage become much more difficult for the Bank. Local people and their environment pay the price.

The draft SPS states in para. 16 of Attachment B, Involuntary Resettlement Safeguard Requirements for Borrowers/Clients: “The borrower/client will establish clear milestones to ensure that no physical and economic displacement of affected people occurs until all compensation payments at full replacement cost and other entitlements are made...” This passive language avoids saying what should be obvious, and what should be included: the ADB should not allow implementation of the investment component of the project to proceed to a point where it impacts communities until such time as the resettlement components have been adequately implemented to protect the rights and interests of the communities affected. The revised policy should also include an explicit link to supervision requirements. If implementation of resettlement activities is lagging, the ADB should withhold further disbursements for the main investment component until the project is in compliance with the policy.

Such a requirement would incorporate a fundamental lesson learned in resettlement best practice over the past decade.

**F. Strengthen provisions for gender analysis and protection of women’s rights**

The existing ADB policy is relatively weak in terms of adequate provisions for ensuring gender-sensitive resettlement plans and practices and safeguarding women’s rights. It is thus shocking that the draft SPS is far worse in this arena than the already-flawed existing policy. The draft SPS makes essentially no mention of “gender” or “women” anywhere in the involuntary resettlement components of the draft, other than to call for gender-disaggregated data, and listing women as a vulnerable group.

This falls vastly below international best practices. See IAP’s January 2007 *Comments on the OED Special Evaluation Study on Involuntary Resettlement* (www.accountabilityproject.org) for examples of model language from ADB’s peer institutions that better reflect best practice on gender and women’s rights. Much of that language centers on specific means for ensuring women’s equal access to and participation in decision-making processes at all project phases.

The importance of ensuring gender-sensitive planning in resettlement is of vital importance to women’s rights and wellbeing. During his term as UN Special Rapporteur on the right to adequate housing, Miloon Kothari found that there was such a great need to account for and specify women’s particular risks and needs in regards to forced displacement and eviction, that he developed an entire set of guidelines specifically on women and adequate housing. Women’s human rights can be endangered in grave ways by forced resettlement, including through being made more vulnerable to violence, sexual abuse, and trafficking and other forms of exploitative labor.

Again, this points to the need for ADB to proactively seek guidance and input from the global community of scholars, advocates and practitioners working to advance understanding and best practices for rights-respecting resettlement—including in the arena of women’s human rights and equality.

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<b>IV. Overarching concerns and general recommendations regarding draft SPS</b>
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We do not inherently disagree with the broad objective of re-organizing the policies in a way that places them under common statements and frameworks, and serves to avoid overlap and contraction. **However, we strongly disagree with the way that such “integration” has been applied in the draft SPS—which guts the policies of much of their specific and concrete language pertaining to how policy principles must be implemented.** There is no reason that policy integration need come at the cost of all specific and concrete language. It is not productive to distill policies down to one page of principles. Without explicit language integrated throughout (or in the form of accompanying, mandatory Guidance Notes) to contextualize policy principles and specify how they must be implemented, the principles remain meaningless and abstract, with dangerous amounts of room for interpretation.

**A. Violation of commitments expressed in 2005 Discussion Note**

The 2007 draft SPS fails to meet several fundamental commitments made in the ADB’s October 2005 Discussion Note. These shortcomings take the SPU process many steps backward. Our analysis finds three major areas in which the draft SPS directly contradicts the objectives of the Discussion Note:

- i. Safeguards have been weakened.* This point has been demonstrated in the above sections of these comments, as well as those submitted by many of our peer organizations.
- ii. Failure to improve clarity, coherence and consistency.* The 2005 Discussion Note commits to “*enhancing the coherence, clarity and internal consistency*” (para 30) of the safeguards. However the SPS has done exactly the opposite: it is a confusing document.

The comments submitted by Oxfam Australia (January 29<sup>th</sup>, 2007) describe the problematic and confusing nature of the SPS structure and components.

In our above comments, we highlight the vague nature of the language throughout the draft SPS, and the lack of clear, objective and measurable criteria to define the nature of project impacts and the corresponding mitigation measures and reporting requirements. **Such language will place an enormous and unnecessary burden on ADB management and safeguard specialists, and will dramatically reduce efficiency.** Every time compliance must be evaluated, ADB staff will have to argue with clients/borrowers over whether their interpretations of the vague requirements constitute non-compliance.

ADB is already understaffed in safeguard support and compliance. The weak and vague language of this draft will create much more work for safeguard specialists, and will cause unnecessary tension and transaction costs at every step. In order to be effective, ADB staff and specialists need to be backed by a clear and strong policy. Without this, every step of the process will be slowed by disputes and ambiguities about what constitutes compliance. Furthermore, for borrowers with weak capacity in certain safeguard areas, a weak and vague ADB policy fails to support these borrowers in clearly understanding what the requirements are, and how those must be implemented and evaluated.

The revised policy should contain clear and measurable criteria, which will support ADB staff and borrowers alike to clearly understand and agree upon safeguard planning, implementation and compliance monitoring.

- iii. ***Upward harmonization has not been achieved.*** The ADB also committed in the Discussion Note to harmonize its policies with those of other multi-lateral institutions. However, this has not been achieved, and in fact has been undermined by the draft SPS, which is weaker than the existing ADB policy and the policies of ADB's peer institutions.

*The revised SPS must exemplify upward harmonization.* ADB safeguard policy harmonization with sister institutions must not compromise key principles and requirements in existing policies. Instead, it should bring together and align best practices from international financial institutions, with norms and requirements of international law.

**The SPU offers the ADB an opportunity to emerge as a leader in defining sustainable environmental assessment, involuntary resettlement and Indigenous Peoples safeguards and setting the bar for future policy revisions at peer institutions and governments.** The SPU is increasingly being seen as a pioneering process emblematic of how multilateral development banks will respond to new 'relevancy' challenges. Peer institutions are watching closely, and thus the outcome of the SPU is very likely to influence safeguard frameworks worldwide. **Now is the time** for ADB to update its safeguard policies in a way that incorporates international best practices, principles of international law, and cutting-edge research on effective safeguard design and implementation.

"Harmonization" may prove to achieve stated goals of encouraging a universal strengthening and aligning of standards, or it may foster a race to the bottom. The outcome of the ADB Safeguard Policy Update will be decisive in shaping the meaning and future of this term.

## **B. Problematic and inappropriate structure of SPS**

The ADB has identified the International Finance Corporation's standards for private sector finance as the main model it intends to emulate. This is explicitly stated in the Discussion Note. **We believe that such an approach is misguided for an institution that continues to serve primarily public sector, state-entity clients/borrowers.**

The IFC Performance Standards are designed for private sector clients—not primarily for state entities, as in the case of ADB. The private sector is fundamentally different—private corporations are bound to different entities, primarily their stockholders and board of directors. Private sector entities also have far more discretionary funds, and they are influenced by incentives such as preserving their image, etc. which enable and drive them to decide to spend money on safeguard prevention, mitigation and rehabilitation issues.

But state entities do not have discretionary funds. In fact, **states can only spend money on costs that are associated with an explicit legal requirement**, because state entities get audited. Thus, for state agencies, if they working under a Safeguard policy/legal agreement that only vaguely encourages certain mitigation and rehabilitation efforts—rather than one that explicitly requires very clear and objective measures to be taken—they will not have the political will to do so.

Thus, it is not appropriate for ADB—as an institution that primarily deals with state entities—to try to copy a policy framework designed for private sector corporations that operate under totally different rules and conditions.

We also see in the draft SPS that the ADB may be emulating the principles developed by the World Bank for use in country systems pilot projects. These principles were never meant to serve as a stand-alone policy document, as the World Bank maintained its full set of ten discrete safeguard policies. Distilled principles and vague requirements are not an adequate basis for a functional, responsible safeguard policy framework.

### **C. Harmful and misguided approach to Country Systems**

Recent findings from World Bank pilot projects show that utilizing a CSS approach involves far more cost, time and human resources than anticipated. The ADB should carefully consider its own limitations in being able to effectively implement a country systems approach, including the size, scope and areas of expertise of its staff and the financial resources available for safeguard implementation. At this time, it may not be feasible or responsible for the institution to move toward a CSS approach. The ADB should first focus on improving and accounting for gaps in its *own* policy and practice.

### **D. Focus on borrowers/clients rather than affected people**

The draft SPS completely centers on meeting the needs of ADB and its clients/borrowers. Multiple statements in the October 2005 Discussion Note and other documents reveal that the SPU process is being driven by the primary objective of making lending easier for these parties. **This is not the appropriate focus for an update of safeguard policies, which were created first and foremost as tools for protecting the rights and wellbeing of affected people and the environment.** ADB leadership must remind management and borrowers that the *raison de etre* for safeguard policies is to ensure that no harm befalls project-affected people, and that their rights and wellbeing are protected and advanced. **These people must be kept at the forefront** of any meaningful safeguard policy. Any changes in the safeguard policy framework must be firmly

backed up by a sound justification/rationale explaining how the change benefits local people and their environment.

#### **E. ADB must address institutional problems around human resources**

The ADB is currently beset by internal and external critiques around human resources issues. Staff inside the Bank are concerned about lack of transparency, correct criteria and Board oversight in hiring decisions. Externally, clients are expressing frustration due to ADB being unresponsive, and to a perceived lack of high-caliber staff and consultants—without which ADB cannot offer any added value. Furthermore, it is widely recognized that ADB needs to enhance its capacity and resources for implementing and monitoring safeguard compliance on the ground. Calls from civil society—that the ADB needs to devote more resources to on-the-ground monitoring and supervision of safeguard implementation—have been affirmed by the recent OED recommendations, as well as by informal assessments by management. The ADB must take bold action to address these crises, otherwise it risks losing qualified staff who will opt to leave, and it will lack the institutional credibility and capacity to needed to deliver on safeguard and sustainable development objectives.

To ensure world-class safeguard implementation, the ADB will need to make major institutional changes around financing and hiring. The ADB must hire and actively support staff with expertise in safeguards issues, quality monitoring, and diverse arenas of sustainable development. Changes should include deploying more staff and resources to resident missions and project areas, to break away from a headquarters-centric approach, and achieve better safeguard compliance and outcomes on the ground. **In order for the ADB to meaningfully deliver on the promise to make safeguards its added value, it will need to undertake some significant restructuring and devote the necessary human and financial resources toward this goal.**

<b>V. Conclusion</b>
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The ADB is undertaking this policy review at a time in which the institution could take a truly global leadership role in defining what effective safeguard systems will look like in the future. We sincerely hope the ADB will step up to fulfill this opportunity and responsibility. To do so, the ADB should re-work the SPS to address the issues highlighted in these comments and those submitted by many of our peer organizations. This will also require a revision process in which the ADB proactively seeks input and guidance from a diversity of academics, NGOs and communities with extensive experience in involuntary resettlement. Such input and collaborative efforts will be necessary to design a resettlement policy that truly responds to the lessons learned over the past decades, and which effectively addresses the trends, injustices and challenges of development-induced displacement in the 21<sup>st</sup> century.