



Clarifications to ADB by BIC on BIC Comments of April 1, 2008 on ADB's October 2007 Draft Safeguard Policy Statement

BIC's original comments¹ were submitted on April 1, 2008 to the Asian Development Bank. ADB subsequently requested a phone meeting with BIC to seek clarifications on certain parts of the comments. This phone meeting took place on April 28, 2008. The ADB side was lead by Xiaoying Ma (SPU Team Leader and Environment Specialist) and Kai Schmidt-Soltau (Social Development Specialist). The BIC side comprised Bruce Jenkins (Policy Director), Mishka Zaman (Asia Program Manager), and Steve Herz (BIC Consultant & primary author of comments).

This document responds to ADB's specific requests for clarification.

1. Alignment with International Standards: One of the overarching themes of our comments is that ADB should align its safeguard policies with internationally-agreed upon principles, objectives and commitments regarding economic and social development and environmental protection. Standards that have been incorporated into international agreements or developed through intergovernmental or government-led multi-stakeholder processes reflect a consensus of governments or other leading policy-makers on the nature of an appropriate policy response to an issue of international importance. Accordingly, we believe that ADB should pay due regard to these standards by (a) treating them as authoritative guidance; (b) striving to harmonize its policies with them wherever possible; and (c) clearly explaining its justification for not harmonizing where it chooses not to do so. (BIC Comments, section II).

ADB has requested that BIC elaborate this argument further, noting the specific objection that the ADB is not bound by the work of United Nations agencies as it has no direct relationship with the United Nations.

BIC Clarification: There are two provisions of ADB's Charter that provide a basis for harmonizing ADB's safeguard policies with the norms and standards promulgated by the United Nations and other international organizations. First, ADB is required by its Charter to cooperate with the United Nations, its subsidiaries, and other international organizations that are working to advance development in the region. Chapter I, Article 2 of the *Agreement Establishing the Asian Development Bank* provides:

To fulfill its purpose, the Bank shall have the following functions:

(v) to co-operate, in such manner as the Bank may deem appropriate, within the terms of this Agreement, with the United Nations, its organs and subsidiary bodies including, in particular, the Economic Commission for Asia and the Far

¹ "COMMENTS ON THE ASIAN DEVELOPMENT BANK DRAFT SAFEGUARD POLICY STATEMENT: THE NEED FOR AN INTERNATIONAL STANDARDS-BASED APPROACH", <http://www.adb.org/Safeguards/BIC-1Apr2008.pdf> , <http://www.bicusa.org/en/Issue.Resources.46.aspx>

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East, and with public international organizations and other international institutions, as well as national entities whether public or private, which are concerned with the investment of development funds in the region, and to interest such institutions and entities in new opportunities for investment and assistance;

We believe that the charter-based requirement to cooperate with these institutions necessarily entails a good faith effort to fully align ADB's safeguard policy framework with the standards and objectives that these institutions have promulgated.

Second, Article 3(1) makes clear that membership in the ADB is open only to countries that are members of the United Nations and its specialized agencies. Since all the members of the ADB are also members of the United Nations, it seems peculiar to suggest that countries need not respect United Nations standards when they act through, or borrow from, the ADB. Quite simply, countries retain the commitments and aspirations that they agreed to under the auspices of the United Nations when they act through the Asian Development Bank.

In addition to these charter-based requirements, we believe that there are a number of important policy objectives that would be advanced by aligning ADB's safeguards policies with other international standards, particularly those promulgated by UN agencies.

1. Policy Coherence: One of the stated objectives of the Draft SPS is to harmonize approaches and objectives with other MDBs and with the Millennium Development Goals. We agree with this harmonization goal, but believe that it should include a broader range of international standards and actors. In particular, given the prominence, broad governmental participation, and demonstrated expertise of U.N. agencies, we would argue that ADB should also endeavor to harmonize its policies with U.N. promulgated standards. Indeed, by stating its intent to harmonize its safeguards with the MDGs, ADB has implicitly recognized the importance of aligning objectives with U.N. initiatives.

2. Comity and Support for the Work of the United Nations: Although ADB may not have a formal relationship with the United Nations, it should respect the prominent—even privileged—position of the United Nations as a venue for intergovernmental collaboration on the most pressing issues of international concern. By explicitly tethering its operational policies to U.N. standards, ADB would make a powerful statement of support for the work of U.N. agencies. Conversely, ADB implicitly disparages or marginalizes this work when it declines to clearly integrate U.N. standards into its policy framework.

For example, by crafting an Indigenous Peoples policy that does not explicitly reference and incorporate the provisions of the UN Declaration on the Rights of Indigenous Peoples, ADB sends a clear message to borrowing governments that it does not take the Declaration seriously enough to integrate it into its work. Given ADB's considerable prestige in the region, this can only undermine the normative value of the Declaration. We believe that ADB should use its institutional authority to proactively support intergovernmental initiatives such as the U.N. Declaration, not to marginalize or undermine them.

3. Expertise: By virtue of their mandate, many U.N agencies have greater capacity and expertise than ADB to set international standards in specific policy areas. Indeed, many of these organizations have already issued substantial guidance in their areas of expertise. ADB should endeavor to capture the expertise and learning of these institutions by tethering its safeguards to their standards and policy prescriptions.

4. International Legal Obligations: In certain circumstances, U.N. generated standards create binding legal obligations that ADB should respect. First, ADB should not help finance the violation of the international law obligations of its borrowers. ADB has recognized this principle with respect to labor rights in its Social Protection Strategy, which provides: “[a]ll Asian and Pacific DMCs, by virtue of being member of the International Labour Organization (ILO), are held to respect, promote, and realize the fundamental Core Labor Standards.”

Second, ADB itself has certain obligations under international law. As we noted in the Appendix to our comments, “there is now a broad consensus among international jurists, legal scholars and practitioners that ‘international organizations, as a result of their international personality, are considered to be bound by general international law, including any human rights norms, that can be viewed as customary law or general principles of law.’” The fact that the ADB is not an agency of the U.N. does not abrogate these obligations.

We would welcome the opportunity to have a more detailed dialogue with ADB’s SPU Team (and perhaps representatives of ADB General Counsel’s office) about the importance of aligning ADB’s safeguard policies with international standards.

2. Disclosure of Environmental Management Plans: In response to our argument that the Draft SPS does not require borrowers to disclose environmental management plans (BIC Comments, section IIIC), it was suggested that Attachment A, para 14 requires that environmental management plans be disclosed to key stakeholders.

BIC Clarification: Paragraph 14(3) requires the disclosure of “...corrective action plans prepared during implementation, if any...” We are unclear if the term “corrective action plans” referred to in this section is meant to refer to the EMPs defined and described in Paragraphs 10 and 11. Since ADB expressed its intent to require that EMPs be disclosed under this provision, we recommend that the term “corrective action plan” be replaced with “environmental management plan” to clarify that it refers to the planning documents (not just implementation plans) discussed in Paragraphs 10-11.

3. Disclosure of EIAs 120 Days Before Board Consideration: In our comments, we expressed concern that the SPS Draft drops the current 120 day minimum public review period for EIAs. (BIC Comments, section IIIC). In response, it was suggested that Attachment A, Paragraphs 12-14 require that these documents are disclosed prior to public consultation.

BIC Clarification: We recognize that Paragraphs 12-14 articulate ADB’s intent to ensure that public consultations are effective and meaningful, that participants are fully informed of the issues at stake, and that they therefore have access to key documents prior to consultation.

However, for public consultations to be effective and meaningful, there must be ample time for participants to consider and assess critical information and prepare their contributions. Equally important, there must be adequate time for deliberation and iterative dialogue among stakeholders, so that there are real opportunities for ADB and government decision-makers to learn from the consultations and refine their proposals accordingly. We therefore remain concerned that the quality of discourse and the opportunities for deliberative decision-making may suffer in the absence of any minimum time period for public review. We therefore maintain that the existing 120-day minimum review period should be retained.

4. Significant Conversion or Degradation of Critical Natural Habitat: We expressed concern in our comments that the Draft SPS would allow substantial adverse impacts to critical natural habitats. (BIC Comments, section IIID). In particular, it allows “significant conversion or degradation” of critical natural habitats—far greater impacts than are allowed under IFC’s Performance Standards. In response, ADB made clear that the provision was intended to fully protect the ecosystem values of critical affected areas, and requested further clarification as to why we believe that the language will allow inappropriate impacts.

BIC Clarification: We believe that the Draft SPS is substantially weaker than IFC Performance Standard 6 in its protection of critical natural habitats. While the Draft SPS precludes project activity that causes “significant conversion or degradation” to critical natural habitats, IFC’s Performance Standard 6 precludes project activities that cause “measurable adverse impacts” on the ability of the critical habitat to support the established population of critical species, or provide other essential ecosystem services.

The “measurable adverse impacts” standard is markedly more protective of biodiversity and ecosystem values than the “significant conversion or degradation” standard. This is evident for two reasons. First, IFC applies the “significant conversion or degradation” standard to *non-critical* natural habitats (Performance Standard 6, para 7). Thus, the Draft SPS essentially gives *critical* natural habitats only the level of protection that IFC would give to *non-critical* natural habitats.

Second, IFC defines “significant conversion or degradation” as: “(i) the elimination or severe diminution of the integrity of a habitat caused by a major, long-term change in land or water use; or (ii) modification of a habitat that substantially reduces the habitat’s ability to maintain viable population of its native species.” Clearly, this construction is intended to address impacts that far surpass the threshold of “measurability”.

We hope that the next iteration of the Draft SPS will strengthen the protections afforded to critical natural habitats by incorporating IFC’s “measurable adverse impacts” standard.

5. Resource Conservation and Energy Efficiency: We suggested in our original comments that the Draft SPS does not require project sponsors to incorporate resource conservation or energy efficiency measures. (BIC Comments, section IIIE). In response, ADB pointed out that Principle 9 of the “Objectives, Scope and Policy Principles on Environmental Safeguards” does require ADB to ensure opportunities for “good practices of energy efficiency and renewable energy” where financially and technically feasible.

BIC Clarification: We appreciate your calling our attention to this provision of the policy principles. We note, however, that similar language is not incorporated into the text of the Environment Safeguard Requirements set out in Attachment A. We believe there may be other examples in which the Principles and the Safeguard Requirements are not in precise alignment, and encourage ADB to rectify any such inconsistencies in developing the next Draft.

Moreover, we believe that the language in Principle 9 is too vague and discretionary to provide the kind of policy guidance that is necessary. The exhortation to “ensure opportunities” to adopt feasible good practices could be interpreted to require little more than to take efficiency issues into account. Given the importance of these issues, and the inevitably that they will grow more important over time, we believe that ADB should adopt much more explicit, and mandatory requirements, including that “best available technologies” be employed.

6. Public Disclosure of Pollutant Releases: We expressed our concern that the Draft SPS does not require borrowers to publicly report on the nature and quantity of the pollutants that they have released into the environment. (BIC Comments, section III E). ADB explained that ADB anticipates this information would be included in the environmental monitoring reports that must be disclosed under Paragraph 14(iv).

BIC Clarification: We welcome the ADB clarification that environmental monitoring reports should include data on pollutant releases and transfers. Upon review, we see that the monitoring provisions of Attachment A, section G(ii) clearly *imply* that pollutant release data must be monitored and disclosed. Nevertheless, these provisions are somewhat general, and additional guidance regarding ADB’s expectations regarding what a monitoring report must include may prove useful for all stakeholders.

7. Scope of SPS: BIC was unsure if the SPS was clear in stating it would cover all ADB investments, including loans, grants and equity investments. The Policy Objective for each policy area in the draft SPS only mention “projects”. ADB was unable to understand how the SPS could apply to TA grants.

BIC Clarification: BIC clarified that World Bank safeguards apply to project investments, TA loans/grants, and to policy loans (the latter has a more limited application). We raise this because Paragraph 36 of the draft SPS states “*ADB is therefore committed to ensuring social and environmental sustainability of the projects it supports*”. In contrast, the existing three safeguard policies, as stated in Paragraph 40 of draft SPS, have wider scope as explained by the sentence “*The policies apply to all projects including ADB-funded and/or ADB-administered sovereign and non-sovereign investment projects funded by a loan, and/or a grant, and/or other means, such as equity and/or guarantee (hereafter broadly referred to as projects).*” BIC requests the ADB should clarify the scope of the SPS, and specifically whether it would apply to program loans and TA grants/loans.

8. Operationalizing Free Prior and Informed Consent for Indigenous Peoples: In response to our comment that ADB should incorporate the U.N. Declaration’s FPIC standard for projects that affect indigenous peoples (BIC Comments, section IV C), ADB inquired whether BIC could provide additional guidance regarding how FPIC should be operationalized.

BIC Clarification: We believe that indigenous organizations and other civil society groups that have developed particular expertise on indigenous issues are best positioned to provide guidance on how FPIC should be operationalized. Accordingly, we would encourage ADB to direct this question to such organizations, particularly those that have already provided comments on the Draft SPS and attended the IP consultation in Manila. We would, however, offer three initial observations. First, FPIC is intended to strengthen community self-determination and should not be misunderstood to require that it affords individuals with a “right to veto.” Second, ADB need not develop implementation guidelines for FPIC from scratch--there is a large and growing body of academic literature and practical experience on this topic. Third, while we recognize that implementing FPIC may be challenging in some circumstances, there is no reason to believe that the challenges are any greater for FPIC than they would be for the “broad community support” standard that the Draft SPS adopts.

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