



Understanding the Asian Development Bank's Safeguard Policy

What protections does the Bank's new Safeguard Policy provide for communities and the environment?

Jessica Rosien

Acronyms

| | |
|--------|--|
| ADB | Asian Development Bank (also referred to in this document as "the Bank") |
| CSS | Country Safeguard System |
| EIA | Environmental Impact Assessment |
| ESMS | Environmental Social Management System |
| FI | Financial Intermediary |
| NGO | Non-government Organisation |
| OM | Operations Manual |
| SIA | Social Impact Assessment |
| SPS | Safeguard Policy Statement (also referred to in this document as "the (new) Policy") |
| UNDRIP | United Nations Declaration on the Rights of Indigenous Peoples |
| USD | United States Dollar |

Published 2010 © all rights reserved

Oxfam Australia

132 Leicester Street, Carlton

Victoria 3053 Australia

ABN 18 055 208 636

Telephone: +61 3 9289 9444

This report is available online at www.oxfam.org.au

Author: Jessica Rosien

Editor: Kathryn Dinh

Proof reader: Christine Graunus

Design and production: Sarah Marlowe

Printed on 100 percent recycled paper.

Acknowledgements

This publication benefited from the review and comments of several people. The author would specifically like to thank Michael Simon, Serena Lilywhite, Joanna Levitt, Nicole Breeze and James Ensor for helpful recommendations. Credit for much of the content analysis of the new Safeguard Policy goes to the collective effort of the network of NGO Forum on ADB, effectively facilitated by its Secretariat.

Oxfam Australia is affiliated with the Australian Council for International Development (ACFID), by whose code of ethics we are bound; Oxfam International, by whose constitution and code of conduct we are bound; People in Aid, by whose code we are bound; and the Refugee Council of Australia.

Front cover: Project site of Nam Theun 2 Hydropower Project in Laos, to which the ADB provided a US \$120 million in financial support (US \$ 70 million in loans, and US \$ 40 million in political risk guarantee) out of a total project cost of US \$ 1.45 billion. Photo: Michael Simon/OxfamAUS.

Contents

| | |
|---|-----------|
| Policy navigation tool | 4 |
| Executive summary | 5 |
| 1. Introduction | 7 |
| 2. Overview of the new Policy | 8 |
| 2.1 General Policy requirements | 8 |
| 2.2 Environment safeguard requirements | 10 |
| 2.3 Involuntary resettlement safeguard requirements | 11 |
| 2.4 Indigenous Peoples safeguard requirements | 14 |
| 2.5 Special requirements for different finance modalities | 15 |
| 2.6 Country safeguard systems | 16 |
| 2.7 Prohibited investments | 17 |
| 2.8 Operations Manual | 17 |
| 3. Summary assessment of the new Policy | 19 |
| 3.1 Overview | 19 |
| 3.2 Environment | 19 |
| 3.3 Involuntary resettlement | 20 |
| 3.4 Indigenous Peoples | 21 |
| 3.5 Financing modalities | 22 |
| 3.6 Operations Manual | 23 |
| 4. Implications for civil society organisations | 24 |
| 4.1 Resistance to arbitrary interpretation | 24 |
| 4.2 Particular attention to different types of investment/financing modality | 24 |
| 4.3 Particular attention to application of country safeguard systems | 24 |
| 4.4 Monitoring of safeguards implementation in the ADB's response to the financial crisis | 25 |
| 4.5 Documenting poor policy implementation | 25 |
| 4.6 Utilisation of Accountability Mechanism | 25 |
| 5. Conclusion | 26 |
| Endnotes | 27 |
| Appendix 1: Overview of policy review process | 28 |

Policy navigation tool

This tool identifies the sections of the Asian Development Bank's Safeguard Policy Statement that are relevant for project monitoring and provides their location within the Policy document.

| Section/subsection | Content | Location |
|--|---|-----------------------------|
| Glossary | Definitions of the key terms | before table of contents |
| Safeguard Policy Statement: overarching statement on ADB's Commitment and Policy Principles | | |
| general statement | | pp. 14 – 15, paras 42 – 48 |
| environmental safeguards | objectives, scope and triggers, policy principles | pp. 16 |
| involuntary resettlement safeguards | objectives, scope and triggers, policy principles | pp. 17 |
| Indigenous Peoples safeguards | objectives, scope and triggers, policy principles | pp. 18 |
| Policy Delivery Process | | |
| general requirements | | pp. 19 – 22, paras. 49 – 60 |
| special requirements | Safeguard Frameworks | pp. 22 – 23, paras. 62– 64 |
| | financial intermediaries | pp. 22 – 24, paras. 65 – 67 |
| | strengthening and use of country safeguard systems | pp. 24 – 26, paras. 67 – 69 |
| | projects with co-financing | pp. 26, para. 69 |
| roles and responsibilities | ADB's roles and responsibilities | pp. 26, paras. 71 – 72 |
| | roles and obligations of borrowers/clients (general) | pp. 26, para. 73 |
| Specific requirements for borrowers and clients (Appendices 1 – 6) | | |
| Appendix 1 | Safeguard Requirements 1: Environment | pp. 30 – 40 |
| Annex to Appendix 1 | Outline of an Environmental Impact Assessment Report | pp. 41 – 43 |
| Appendix 2 | Safeguard Requirements 2: Involuntary Resettlement | pp. 44 – 50 |
| Annex to Appendix 2 | Outline of a Resettlement Plan | pp. 52 – 54 |
| Appendix 3 | Safeguard Requirements 3: Indigenous Peoples | pp. 55 – 62 |
| Annex to Appendix 3 | Outline of an Indigenous Peoples Plan | pp. 63 – 65 |
| Appendix 4 | Special Requirements for Different Financing Modalities | pp. 66 – 69 |
| Annex 1 to Appendix 4 | Outline of an Environmental Assessment and Review Framework | pp. 70 – 71 |
| Annex 2 to Appendix 4 | Outline of a Resettlement Framework | pp. 72 – 73 |
| Annex 3 to Appendix 4 | Outline of an Indigenous Peoples Planning Framework | pp. 74 – 75 |
| Appendix 5 | ADB Prohibited Investment Activities List | pp. 76 |
| Appendix 6 | Strengthening and Use of Country Safeguard Systems to Address Environmental and Social Safeguard Issues | pp. 77 – 82 |

Executive summary

This paper presents an overview of the Asian Development Bank's (ADB) new Safeguard Policy Statement ("the Policy"), approved in July 2009¹. The purpose of the paper is to provide civil society organisations with an understanding of the new Safeguard Policy Statement and explain implications for project monitoring. The target audience for this paper is national and international civil society organisations who monitor safeguards standards and international practices in regard to the environmental and social impacts of development projects.

This paper will be complemented by resources for communities affected by ADB projects, which will provide more detailed and accessible information on how to understand and use the policies at a local level. Oxfam, NGO Forum on ADB ("NGO Forum") and its members are planning to produce a series of such resources in 2010, which will be translated into selected Asian languages.

In 2005, the ADB embarked on a review process² of its three safeguard policies on the environment, involuntary resettlement and Indigenous Peoples. The 2009 Safeguard Policy Statement is the result of this four-year process. NGO Forum on ADB's network members, including Oxfam, were heavily involved in monitoring and influencing the review process. As a result, the new Safeguard Policy Statement retains most of the provisions of the previous policies. Without the interventions of the NGO Forum network, the review process would have almost definitely resulted in a much weaker Safeguard Policy Statement. For more details on the Policy Review Process, see Appendix 1.

The key strengths and shortcomings of the new Safeguard Policy Statement³ can be summarised as follows:

General strengths:

- Mainstreaming of gender considerations: the Policy requires gender sensitive and responsive application of the safeguard policy provisions.
- Country safeguard systems: the proposed introduction of country safeguard systems is intended to increase borrowing member countries' capacity and autonomy in regard to rigorous and effective safeguard policy implementation.

General shortcomings:

- Country safeguard systems: While the Policy provides for a phased approach for the introduction of country safeguard systems, there is no explicit provision for amendment or discontinuation of the country systems approach if the findings from the review scheduled for 2013 demonstrate that the country systems lead to non-compliance with the ADB's safeguard policy provisions.

Strengths in regard to the environment:

- Transboundary and cumulative impacts: The Policy requires that environmental impact assessments evaluate transboundary and cumulative impacts of ADB projects or programs.

Shortcomings in regard to the environment:

- Loopholes in regard to pollution: The Policy allows the borrower/client to not comply with international good practice in pollution prevention in specific project circumstances, without defining these circumstances. In addition, the Policy allows the borrower/client to proceed with projects, even if structural elements of projects are in high risk locations and where failure or malfunction may threaten the safety of communities.
- Failure to integrate environmental accounting: The Policy does not require environmental accounting and does not require the mainstreaming of environmental considerations in ADB operations in a meaningful way.

Strengths in regard to involuntary resettlement:

- Improved standards of living for poor and vulnerable groups: The Policy requires that poor and vulnerable groups affected by resettlement must have improved standards of living after the project has been completed.

Shortcomings in regard to involuntary resettlement

- Restricted scope of application: Other than in undefined exceptions, the Policy excludes people affected by economic displacement from compensation under the Involuntary Resettlement provisions, if the economic displacement has not been caused directly by land acquisition.

- Negotiated agreement supersedes Policy provisions: The Policy states that if the borrower/client reaches a negotiated agreement with the affected people, the safeguard requirements in regard to involuntary resettlement no longer apply.
- Limited protection for affected people without legal title: If people are affected by loss of land, the Policy does not require that they are compensated with land if they do not hold a legally recognisable title.

Strengths in regard to Indigenous Peoples:

- Broad community support: The Policy states that the ADB will not finance projects in the absence of broad community support.
- United Nations Declaration on the Rights of Indigenous People: The Policy explicitly refers to the United Nations Declaration on the Rights of Indigenous People.

Shortcomings in regard to Indigenous Peoples:

- Free, prior, informed consent: The Policy fails to consistently integrate the principle of free, prior, informed consent as enshrined in the United Nations Declaration on the Rights of Indigenous People.
- Scope of broad community support: The Policy only requires broad community support for projects affecting Indigenous People in certain circumstances, rather than for all projects impacting on Indigenous Peoples.

New areas in the Policy

Financing modalities:

- Staff resources: Even though the Policy introduces flexibility for special types of financing modalities, the Policy fails to commit resources for additional staff to monitor the implementation of the more flexible requirements.
- Definition of financial intermediaries: The Policy fails to clearly define financial intermediaries, thus allowing for arbitrary application of the requirement for financial intermediaries.

The effectiveness of the Safeguard Policy Statement will depend on diligent implementation. Civil society organisations can play a key role in monitoring the implementation of the ADB's Safeguard Policy Statement in regard to the following areas:

- resisting arbitrary interpretation of the Policy in instances where the Policy language is vague
- paying particular attention to the implementation of the Policy in regard to different finance modalities
- monitoring whether the introduction of country safeguard systems is resulting in Policy non-compliance
- monitoring the implementation of the Policy in infrastructure projects under the ADB's financial crisis response
- utilising the ADB's accountability mechanism
- documenting Policy non-compliance.

This publication aims to contribute to the implementation of the new Safeguard Policy Statement by enabling civil society organisations to use the Policy for project monitoring purposes.

1. Introduction

"Safeguard policies are key for protecting communities from the unintended harmful impacts of projects. In many cases, violation of the Bank's safeguard policies, or weaknesses in the policies themselves, have been the cause of high profile controversy surrounding projects that have had harmful impacts on communities."

On 20 July, 2009, the Asian Development Bank (ADB) approved its new Safeguard Policy Statement (referred to in this publication as "the Policy"). This report explains why and how this is important. The ADB's Safeguard Policy Statement is intended to protect communities from the harmful impacts of ADB projects and programs. The ADB's Safeguard Policy Statement relates to three areas: impacts on the environment, involuntary resettlement and impacts on Indigenous Peoples.

The new Safeguard Policy Statement replaces the ADB's previous separate policies on each of these areas: a Policy on Indigenous People (1998)⁴, an Involuntary Resettlement Policy (1995)⁵ and an Environment Policy (2002)⁶.

Safeguard policies are key for protecting communities from the unintended harmful impacts of projects. In many cases, violation of the Bank's safeguard policies, or weaknesses in the policies themselves, have been the cause of high profile controversy surrounding projects that have had harmful impacts on communities.

As a multilateral institution made up of member governments, the ADB is not legally required to abide by national laws, and its charter provides the Bank with immunity from judicial proceedings. The ADB's own policies are therefore the only tools that civil society and affected people can use to hold the Bank to account. The ADB's semi-independent Accountability Mechanism enables affected communities to file a complaint if they feel that they have suffered material harm. Safeguard issues have been at the core of most complaints that have been brought to the ADB's Accountability Mechanism, as well as to its previous incarnation, the Inspection Panel.

The standards contained in the ADB's Safeguard Policy Statement have far-reaching impacts. They determine the ADB's environmental and social obligations for its annual and rising lending volume of over USD \$7 billion, and influence emerging national legal frameworks in Asia⁷. Due to the Bank's increasing support for private sector operations, the Safeguard Policy Statement also determines how private financing, supported by the ADB, operates in Asia.

A sound understanding of the ADB's new Safeguard Policy Statement is vital for civil society groups and affected communities in order to successfully monitor projects and prevent destructive project outcomes. The purpose of this publication is to provide an overview of the new Policy and its implications for civil society organisations monitoring ADB projects and policies. The report summarises the key provisions of the new Policy, followed by a brief comparison with the old policies. The report then draws out key implications for civil society organisations to be aware of in project monitoring. A brief overview of the policy review process is provided in Appendix 1.

2. Overview of the new Policy

The structure of the new Policy differs substantially from the old policies largely because the three existing policies have been amalgamated into one Safeguard Policy Statement.

The core pieces of the Policy are now:

- the overarching statement on ADB's commitment and policy principles
- the objectives, scope and principles stated for each of the three thematic safeguard policy areas (environment, involuntary resettlement and Indigenous Peoples)
- the safeguard requirements for borrowers/clients. These are on the three safeguard policy areas – environment, involuntary resettlement and Indigenous Peoples

- the safeguard requirements pertaining to special financing modalities. These requirements are new and reflect the fact that the ADB has in recent years introduced and/or increased different types of lending in addition to traditional project financing.

In most cases, these new lending modalities involve large upfront disbursements, and the safeguard requirements are less specific. (see Section 2.5)

The policy navigation tool on page 4 lists the sections of the Safeguard Policy Statement (SPS) which are of relevance for project and program monitoring.

Summary of key provisions

The following section contains excerpts of the key provisions of the Policy.

Note: The phrasing of the provisions below closely resembles the language used in the Policy. In cases where the Policy uses the wording “the ADB/the borrower/client will do X”, this phrasing has been replaced to read “the ADB/the borrower/client is required to do X”, as it is clear that this must be the intent of a binding policy document. The provisions listed below apply equally to public and private sector operations supported by the ADB.

2.1 General Policy requirements

The overarching statement on ADB's Commitment and Policy Principles (Chapter V) says that the ADB's safeguards have the following objectives (SPS, p 15): i) avoid adverse impacts of projects on the environment and affected people, where possible; ii) minimise, mitigate, and/or compensate for adverse project impacts on the environment and affected people when avoidance is not possible; and iii) help borrowers/clients to strengthen their safeguard systems and develop the capacity to manage environmental and social risks.

The Policy Delivery section (Chapter V B, paras. 53 – 64) lists general requirements that the ADB is obliged to follow in regard to: project screening and classification, information disclosure, consultation and participation, due diligence, monitoring and reporting, local grievance redress mechanisms and the Bank's Accountability Mechanism.

The details for these provisions in summary are:

Project screening and classification

The Policy stipulates that the ADB will undertake project screening as early as possible to i) determine the significance of adverse impacts; ii) identify the level of assessment and institutional resources required; iii) determine disclosure requirements (para. 50).

Information disclosure

In line with the ADB's Public Communications Policy, the Policy contains the following disclosure requirements (para. 53):

- for environment Category A (see below) projects, draft environmental impact assessments must be posted on the ADB's website 120 days before project approval.

In regard to other documents, the Policy is less concrete. For draft environmental assessment and review frameworks, draft resettlement frameworks

and/or plans and draft Indigenous Peoples planning frameworks and/or plans, the Policy only stipulates that these documents must be provided by the borrower/client and posted on ADB's website before project appraisal, as follows:

- final or updated environmental impact assessments and/or initial environmental examinations, resettlement plans, and Indigenous Peoples plans upon receipt (by the ADB).
- environmental, involuntary resettlement and Indigenous Peoples monitoring reports submitted by borrowers/clients during project implementation upon receipt (by the ADB).

Consultation and participation

The general provisions on consultation and participation are mostly phrased as aspirations. The Policy states that the ADB "is committed to working with borrowers/clients to put processes of meaningful consultation and participation in place."

Meaningful participation is defined as: i) beginning early in the project preparation stage and being carried out on an ongoing basis throughout the project cycle; ii) providing timely disclosure of relevant and adequate information that is accessible to affected people; iii) being free of intimidation and coercion; iv) being gender inclusive and responsive; and v) enabling the incorporation of all relevant views of affected people and other stakeholders in decision-making (para. 54).

The Policy stipulates that where Indigenous People are affected by a project, the principle of free, prior, informed consent will be applied under the following specific circumstances: i) commercial development of the cultural resources and knowledge of Indigenous People; ii) physical relocation from traditional or customary lands; iii) commercial development of natural resources on lands used by Indigenous People that have impacts on the livelihoods or on cultural, ceremonial, or spiritual uses that define the identity and community of Indigenous Peoples (para. 55) (see also Section 2. 4).

Due diligence and review of safeguard assessments and plans

Due diligence refers to the ADB's process of assessing safeguard issues through field visits and desk reviews as well as through examining relevant safeguard documents (such as environmental impact

assessments [EIAs], resettlement plans, Indigenous Peoples' plans). Through its due diligence processes, the ADB confirms that all potential environmental and social risks are identified. If they cannot be avoided, it ensures that appropriate mitigation measures are identified (SPS, para. 56).

Monitoring and reporting

As with other sections of the Policy, the monitoring requirements are subject to interpretation, as they are merely required to be "commensurate with the project's risks and impacts". For highly complex and sensitive projects, the ADB requires the borrower/client to engage an independent advisory panel (SPS, para. 57). "Complex and sensitive" projects are defined as "highly risky or contentious or (involving) serious and multidimensional and generally interrelated potential social and/or environmental impacts" (SPS, para. 57, footnote 27), another somewhat arbitrary and circular definition.

Local grievance redress mechanisms

The Policy requires the borrower/client to set up and maintain a grievance redress mechanism at project level (SPS, para. 59). This mechanism does not replace the ADB's accountability mechanism, but is intended to solve grievances at the local level. Affected people can also take complaints to the ADB's Accountability Mechanism. It is not a prerequisite that affected people must first approach the local grievance mechanism before taking the issue to the Accountability Mechanism. The Accountability Mechanism Policy merely requires complainants to demonstrate that they have sought to address their complaint with management.⁸

2.2 Environmental safeguard requirements

Objective

The objective of the Policy in regard to the environment is to “ensure the environmental soundness and sustainability of projects and to support the integration of environmental considerations into the project decision-making process” (SPS, p. 17).

Categorisation and information disclosure

The Policy uses a categorisation system to reflect the significance of a project's potential environmental impacts. “A project's category is determined by the category of its most environmentally sensitive component, including direct, indirect, cumulative, and induced impacts in the project's area of influence” (SPS, para. 50). The following categories exist:

- Category A: significant adverse environmental impacts that are irreversible, diverse or unprecedented. Category A projects require a full-scale Environmental Impact Assessment (EIA). A draft EIA, including the Environmental Management Plan, must be made available on the ADB's website at least 120 days prior to Board approval.
- Category B: less adverse environmental impacts that are site specific, few of which are irreversible, and mitigation measures that can be designed more readily than for Category A projects. Category B projects require an initial environmental evaluation.
- Category C: minimal or no adverse environmental impacts. Category C projects require further environmental assessment actions/documents.
- Category FI: projects involving ADB funds to, or through, a financial intermediary. Category FI projects require an Environmental and Social Management System.

Final or updated EIAs and/or initial environmental examinations must be made available upon receipt on the ADB's website.

Assessment process

Environmental impacts must be determined in consultation with affected people and concerned non-government organisations (NGOs). For category A

projects, the borrower/client is required to undertake an options assessment that looks at alternatives to the project's location, design, technology and components. The options assessment will also examine the “no project” alternative. The borrower/client must present the rationale for selecting the particular project details, including a cost-benefit analysis that takes into account environmental costs and benefits of the various alternatives considered (SPS, Appendix 1, para. 4).

Type of impacts

The types of impacts related to the environment include physical, biological and socioeconomic impacts. These can relate to occupational health and safety; community health and safety; vulnerable groups; gender issues; and impacts on livelihoods and physical cultural resources (SPS, Appendix 1, para. 5).

Project site/scope

The project site covered by the environmental safeguard provisions in the Policy is defined as: “the primary project site(s) and related facilities that the borrower/client (including its contractors) develops or controls, such as power transmission corridors, pipelines, canals, tunnels, access roads, borrow pits and disposal areas, and construction camps”. This definition also includes: associated facilities that are not funded as part of the project, but “whose viability and existence depends exclusively on the project”; “areas and communities potentially affected by cumulative impacts from further planned development of the project”; and predictable impacts caused by the project “that may occur later or at a different location” (SPS, Appendix 1, para. 6).

Transboundary impacts

The environmental assessment process must identify potential transboundary effects, such as air pollution and increased use or contamination of international waterways. It must also identify global impacts, such as the impact of greenhouse gases and impacts on endangered species and habitats (SPS, Appendix 1, para. 7).

Vulnerable groups

The environmental assessment will examine whether particular individuals or groups may be disproportionately affected due to their disadvantaged or vulnerable status and if so, identify differentiated mitigation measures (SPS, Appendix 1, para. 8).

Environmental planning and management

If environmental impacts are identified, the borrower/client is required to prepare an environmental management plan describing how potential impacts and risks will be addressed (SPS, Appendix 1, para. 12).

Consultation and participation, grievance mechanism

The consultation process and grievance mechanism process follows the same provisions as laid out in the general requirements (see above) (SPS, Appendix 1, paras. 19 and 20).

Reporting and monitoring

Once again, the Policy uses language that is open to interpretation, stating that "the extent of monitoring activities will be commensurate with the project's risks and impacts" (SPS, Appendix 1, para. 21). For Category A projects, the borrower/client is required to retain qualified external experts or qualified NGOs to verify its monitoring information. The minimum requirements are semi-annual reports during construction for Category B projects, and quarterly monitoring reports during construction for Category A reports. For projects with likely ongoing impacts during operation, annual monitoring is required. Monitoring reports must be posted in a location accessible to the public (SPS, Appendix 1, paras. 21 & 22).

Unanticipated environmental impacts

If unanticipated impacts occur during project implementation, the borrower/client is required to update the environmental assessment and environmental management plan or prepare a new assessment and plan (SPS, Appendix 1, para. 23).

Biodiversity conservation and sustainable natural resource management

This section (SPS, Appendix 1, paras. 24 – 49) contains requirements regarding the following issues: modified habitats; natural habitats; critical habitats; legally protected areas; invasive alien species; management and use of renewable resources; pollution prevention and abatement (resource conservation, energy efficiency, waste, hazardous materials, pesticide use and management, greenhouse gas emissions); health and safety (occupational health and safety and community health and safety); and physical cultural resources (SPS, Appendix 1, para. 24).

2.3 Involuntary resettlement safeguard requirements

Objective

The objective of the Policy in regard to involuntary resettlement is to "avoid resettlement wherever possible; to minimize involuntary resettlement by exploring project and design alternatives; to enhance, or at least restore, the livelihoods of all displaced persons in real terms relative to pre-project levels; and to improve the standards of living of the displaced poor and other vulnerable groups" (SPS, p. 17).

Scope

The involuntary resettlement requirements apply to the following situations:

- full or partial, permanent or temporary physical displacement (relocation, loss of residential land, or loss of shelter); and
- economic displacement (loss of land, assets, access to assets, income sources or means of livelihoods) (SPS, Appendix 2, para. 5).

To fall under the resettlement safeguard policy provisions, these impacts must be as a result of: (i) involuntary acquisition of land, (ii) involuntary restrictions on land use or on access to legally designated parks and protected areas (SPS, Appendix 2, para. 5).

The Policy considers resettlement to be involuntary "when displaced individuals or communities do not have the right to refuse land acquisition that results in displacement". This applies in cases where: (i) lands are acquired through expropriation based on eminent domain⁹; and (ii) lands are acquired through expropriation when negotiated settlement processes have failed (SPS, Appendix 2, paras. 4 – 5).

Any adverse project impacts resulting from project activities other than land acquisition are dealt with, and mitigated against, under the environmental assessment process (SPS, Appendix 2, para. 6).

Types of displaced persons

The Policy identifies the following three types of displaced persons who are affected by partial or total land loss: (i) persons with formal legal rights, (ii) persons who lost the land and have no formal legal rights to such land, but who have claims to such land

that are recognised or recognisable under national laws, and (iii) persons who lost the land they occupy and have neither formal legal rights nor recognised or recognisable claims to such land. According to the Policy, all three types of displaced persons fall under the protections of the involuntary resettlement safeguard provisions (SPS, Appendix 2, para. 7).

Compensation

The Policy requires that the borrower/client provides adequate compensation to affected people prior to relocation (SPS, Appendix 2, para. 8).

In cases of physical displacement, the Policy stipulates that compensation should preferably be land-based (rather than cash). The replacement land must have at least the same characteristics in terms of productive potential and advantageous location (eg access to markets) as the land taken (SPS, Appendix 2, para. 9).

In cases of cash compensation for acquired housing, land and/or other assets, the compensation rate must be the full replacement cost, which includes: (i) fair market value; (ii) transaction cost; (iii) interest accrued; (iv) transitional and restoration costs; and (v) other applicable payments, if any. Depreciation of structures and assets should not be taken into account (SPS, Appendix 2, paras. 7 – 11).

In cases of economic displacement, the borrower/client is required to provide compensation for loss of income or livelihood sources at full replacement cost. This applies even if affected people have not been physically displaced. The borrower/client is also required to provide opportunities to displaced persons “to derive appropriate development benefits from the project” (SPS, Appendix 2, para. 12).

In terms of timing, the borrower/client must ensure that no physical or economic displacement occurs until: (i) compensation has been paid to each displaced person for project components that are ready to be constructed; (ii) other entitlements listed in the resettlement plan have been provided; and (iii) a comprehensive income and livelihood rehabilitation program – with an adequate budget – is in place (SPS, Appendix 2, para. 14).

Social impact assessment

The borrower/client is required to conduct socio-economic survey(s) and a census to identify all persons who will be physically and/or economically displaced. The social impact assessment (SIA) must include: (i)

past, present and future potential social impacts; (ii) an inventory of displaced persons and their assets; (iii) an assessment of their income and livelihood; and (iv) gender disaggregated information pertaining to the economic and socioeconomic condition of displaced persons.

The SIA must also identify any individuals or groups who may be disproportionately affected due to their vulnerable status, and recommend mitigation measures to prevent disproportionate adverse impacts (SPS, Appendix 2, paras. 15 & 16).

Resettlement planning

The borrower/client must prepare a resettlement plan, its objective to “ensure that livelihoods and standards of living of displaced persons are improved or at least restored to the pre-project (physical and/or economic) levels”. For the poor and vulnerable groups, the Policy stipulates that standards of living must be improved, not merely restored (SPS, Appendix 2, para. 17).

A resettlement plan must include the following components for displaced people (SPS, Appendix 2, para. 18):

(i) information about their options and entitlements pertaining to compensation, relocation and rehabilitation; (ii) provisions to ensure that affected people are consulted on resettlement options and choices; (iii) provisions to ensure that affected people are provided with resettlement alternatives.

The borrower/client is required to analyse national laws and regulations pertaining to resettlement (land acquisition, compensation and relocation). If there are gaps between the national laws/regulations and the ADB’s policy principles and requirements, the borrower must propose a strategy to fill the gaps in the resettlement plan in consultation with the ADB (SPS, Appendix 2, para. 19).

Costs pertaining to resettlement and compensation are considered project costs. Resettlement expenditure, according to the ADB’s Policy, is eligible for ADB financing. (SPS, Appendix 2, para. 20)

For projects defined as highly complex and sensitive, the borrower/client is required to employ an independent advisory panel of experts not affiliated with the project during project preparation and implementation (SPS, Appendix 2, para. 24).

Negotiated land acquisition

The Policy encourages the borrower/client to reach a negotiated agreement with people affected by involuntary resettlement. If such an agreement is reached, the Policy states that the safeguard requirements on involuntary resettlement no longer apply. In effect this means that a negotiated outcome and all agreements under it replace the ADB safeguard requirements.

According to the Policy, the borrower/client must ensure that any negotiations with displaced people address and mitigate power imbalances in the negotiation process. In order to ensure this, the borrower/client is required to employ an independent external party to document the negotiation and settlement processes (SPS, Appendix 2, para. 25).

Information disclosure

Prior to project appraisal, the borrower/client is required to submit a draft resettlement plan and/or resettlement framework to the ADB. The final resettlement plan must be submitted to the ADB for web-posting after the census of affected persons has been completed. Resettlement monitoring reports must be submitted according to the monitoring schedule.

In addition, the borrower/client is required to provide relevant information to affected persons and other stakeholders in a “timely manner, in an accessible place and in a form and language(s) understandable to affected persons and other stakeholders”. For illiterate people, suitable other communication methods must be used (SPS, Appendix 2, paras. 26 & 27).

Consultation and participation, grievance mechanism

The consultation process and grievance mechanism process follows the same provisions as laid out in the general requirements (see above) (SPS, Appendix 2, para. 28).

Monitoring and reporting

As for the environmental safeguard requirements, the Policy uses language that is open to interpretation in regard to monitoring resettlement impacts, stating that the extent of monitoring activities will be “commensurate with the project’s risks and impacts” (SPS, Appendix 2, para. 21).

For projects with significant involuntary resettlement impacts, the borrower/client must retain qualified and

experienced external experts or qualified NGOs to verify the borrower/client’s monitoring information. If the external panel identifies problems in regard to the resettlement planning process, a corrective action plan must be prepared and the borrower/client must not proceed with implementation of the specific project component (SPS, Appendix 2, para. 21).

The borrower/client is required to prepare semi-annual monitoring reports that describe the progress in implementing resettlement activities, as well as any compliance issues and corrective actions (SPS, Appendix 2, para. 31).

Unanticipated impacts

If unanticipated involuntary resettlement impacts occur during project implementation, the borrower/client is required to conduct a social impact assessment and then update the resettlement plan or formulate a new resettlement plan (SPS, Appendix 2, para. 32).

Special considerations for Indigenous Peoples

The borrower/client is required, to the maximum extent possible, to explore alternative project designs in order to avoid physical relocation of Indigenous Peoples. The Policy qualifies this by stating that such relocation must be avoided if it will result in adverse impacts on the identity, culture or customary livelihoods of Indigenous Peoples (SPS, Appendix 2, para. 33).

2.4 Indigenous Peoples safeguard requirements

Objective

The objective of the Indigenous Peoples safeguard requirements is to “design and implement projects in a way that fosters full respect for Indigenous Peoples’ identity, dignity, human rights, livelihood systems, and cultural uniqueness as defined by the Indigenous Peoples themselves so that they: (i) receive culturally appropriate social and economic benefits, (ii) do not suffer adverse impacts as a result of projects, and (iii) can participate actively in projects that affect them” (SPS, p. 18).

Scope/Definition

The Policy defines Indigenous Peoples as possessing the following characteristics in “varying degrees” (SPS, Appendix 3, para. 6): (i) self-identification as members of a distinct indigenous cultural group and recognition of this identity by others; (ii) collective attachment to geographically distinct habitats or ancestral territories in the project area and to the natural resources in these habitats and territories; (iii) customary cultural, economic, social or political institutions that are separate from those of the dominant society and culture; and (iv) a distinct language, often different from the official language of the country or region.

Trigger

These requirements are triggered if a project directly or indirectly affects the dignity, human rights, livelihood systems or culture of Indigenous Peoples or affects the territories or natural or cultural resources that Indigenous Peoples own, use, occupy or claim as an ancestral domain or asset (SPS, p. 18).

Consultation and participation

The borrower/client is required to conduct meaningful consultation. Affected Indigenous Peoples must be able to participate in an informed way in project design, implementation and monitoring to avoid adverse impacts. Where avoidance of adverse impacts is not possible, Indigenous Peoples must be able to participate in identifying mitigation and compensation measures. The consultation process and its results must be documented and reflected in the Indigenous Peoples plan (SPS, Appendix 3, para. 10).

Consent

The Policy requires the borrower/client seek the consent of affected indigenous communities in projects involving: (i) commercial development of the cultural resources and knowledge of Indigenous Peoples; (ii) physical displacement from traditional or customary land; or (iii) commercial development of natural resources within customary lands under use that would impact the livelihoods or the cultural, ceremonial or spiritual uses that define the identity and community of Indigenous Peoples (Appendix 3, para. 30).

The Policy defines consent as “a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for the project activities listed in para. 30”. According to the Policy, broad community support “may exist even if some individuals or groups object to the project activities” (SPS, Appendix 3, para. 31).

The Policy provides that the “ADB will not finance (a) project if such broad community support does not exist” (SPS, Appendix 3, para. 55).

Social impact assessment

When screening by the ADB confirms likely impacts on Indigenous Peoples, the borrower/client is required to carry out a full social impact assessment. If impacts on Indigenous Peoples are identified, the borrower/client is required to prepare an Indigenous Peoples plan (SPS, Appendix 3, para. 13).

Indigenous Peoples plan

For projects with impacts on Indigenous Peoples, the borrower/client must prepare an Indigenous Peoples plan in conjunction with the project’s feasibility study. This plan must set out measures for the borrower/client to ensure that: (i) affected Indigenous Peoples receive culturally appropriate social and economic benefits; and (ii) when potential adverse impacts on Indigenous Peoples are identified, and where these are unavoidable, to the maximum extent possible, Indigenous Peoples should participate meaningfully in determining mitigation and compensation measures (SPS, Appendix 3, para. 16).

The borrower/client is required to update the Indigenous Peoples plan following the completion of detailed engineering and detailed measurement surveys.

For projects defined as highly complex and sensitive

(see "Resettlement planning" above), independent panels of experts not affiliated with the project must be used during project preparation and implementation. Any highly complex and sensitive projects affecting Indigenous Peoples must include an Indigenous Peoples expert on the advisory panel (SPS, Appendix 3, paras. 17 – 19).

Information disclosure

Prior to project appraisal, the borrower/client must submit to the ADB for its website a draft Indigenous Peoples plan and/or Indigenous Peoples planning framework, including the social impact assessment. The final Indigenous Peoples plan must be submitted upon its completion. Monitoring reports relating to Indigenous Peoples must be submitted according to the monitoring schedule (SPS, Appendix 3, para. 20).

Grievance mechanism

The provisions for the grievance mechanism process follow the same provisions as laid out in the general requirements (see above) (SPS, Appendix 3, para. 22).

Monitoring and reporting

As with the environmental and involuntary resettlement requirements, the Policy states that "monitoring activities will be commensurate with the project's risks and impacts" (SPS, Appendix 3, para. 23).

Unanticipated impacts

If unanticipated impacts on Indigenous Peoples occur during project implementation, the borrower/client is required to carry out a social impact assessment and then update the Indigenous Peoples plan or formulate a new Indigenous Peoples plan covering all applicable requirements specified for Indigenous Peoples plans in the SPS (SPS, Appendix 3, para. 25).

2.5 Special requirements for different finance modalities

In recent years, the ADB has increased its use of different forms of finance modalities, such as program lending, sector lending and multi-tranche financing facilities. The common feature of these lending modalities is that they consist of upfront lending, usually in large amounts, and that the project details and subprojects are not known at the time of Board approval. The Safeguard Policy Statement contains provisions for each of these types of lending.

Program lending

For program loans, the borrower/client is required to evaluate any potential safeguard impacts in regard to the environment, resettlement and/or Indigenous Peoples and to identify appropriate mitigation measures. The borrower/client must prepare a matrix of potential impacts of each policy action, with the corresponding mitigation measures (SPS, Appendix 4, para. 2).

Sector lending

For sector investments with any likely safeguard impacts, the borrower/client must agree on an environmental assessment and review framework, a resettlement framework and/or an Indigenous Peoples planning framework before project approval is given by the ADB. Annexes 1 – 3 of Appendix 4 describe the components of these frameworks.

One or more sample subprojects must be identified and appraised prior to approval of the sector project. For these subprojects, the borrower/client must prepare relevant documentation, including: environmental and social impact assessment reports, environmental management plans, resettlement plans and Indigenous Peoples plans. All the Policy's safeguard requirements apply to all subprojects and their components (SPS, Appendix 4, paras. 3 – 8).

Multi-tranche finance facilities

For multi-tranche finance facility projects with any safeguard impacts, the same process applies as for sector projects (SPS, Appendix 4, paras 9 – 10). Multi-tranche finance facilities are loans which are disbursed in several tranches. At the time of Board approval, only the details of the first tranche are available, and subprojects of the multi-tranche finance facilities are often only identified later in the investment cycle.

Typically, multi-tranche finance facilities are for very large loans, sometimes USD 100 million dollars or more (SPS, Appendix 4, para. 9).

Emergency assistance loans

The Policy stipulates that in cases where preparation of safeguard documents, such as an EIA, resettlement plan and/or Indigenous Peoples plan, is deemed not possible before Board approval, frameworks, such as those required for sector or multi-tranche finance facility loans, must be prepared (SPS, Appendix 4, para. 11).

Financial intermediaries

Where financial intermediary (FI) projects are likely to have safeguard impacts, the financial intermediary is required to "have in place or establish an appropriate environmental social management system (ESMS) to be maintained as part of their overall management system to meet national laws and/or ADB's requirements for FI projects" (SPS, Appendix 4, para. 13). An ESMS must include the financial intermediary's: (i) environmental and social policies; (ii) screening, categorisation and review procedure; (iii) organisational structure and staffing, including skills and competencies in environmental and social areas; (iv) training requirements; and (v) monitoring and reporting processes (SPS, para. 66).

Where subprojects financed by the financial intermediary are likely to have environmental or social impacts, the financial intermediary must ensure that the subprojects meet the ADB's relevant safeguard requirements. The financial intermediary must prepare and submit the relevant safeguard documents (EIA, resettlement plan and Indigenous Peoples plan) according to the Policy requirements (SPS, Appendix 4, para. 15).

The financial intermediary is required to prepare and submit monitoring reports at least annually (Appendix 4, para. 16).

General corporate finance

In cases of general corporate finance loans and/or investments to a corporate institution that is not earmarked for implementing subprojects, the borrower/client is required to conduct a corporate audit of its current environmental and social management system. The borrower/client is also required to audit its past and current performance against the objectives, principles and requirements of the ADB's Safeguard Policy Statement (SPS, Appendix 4, para. 17).

2.6 Country safeguard systems

The Policy states that the ADB is committed to strengthening and using country safeguard systems (CSS). This means that a borrowing country's legal and institutional framework would be applied in regard to the social and environmental impacts of a project instead of the ADB's safeguard policy requirements. The Policy states that the ADB will move towards the country safeguard systems in a phased approach. Country systems will be applied in a limited number of borrowing countries – with a focus on the sub-national, sector or agency level during the first three years after the Policy takes effect. The ADB will then undertake an operations review of the use of country systems (para. 68).

The approach taken by the ADB to using country safeguard systems has two key components. First, in order to apply the country system, the ADB must conduct an "equivalency assessment" which evaluates the country's provisions against ADB safeguard requirements. Only if the country's provisions are found to be equivalent to that of the ADB can the country system be applied. Second, the borrowing country must be found to have the implementation practice, track record, and the capacity and commitment to implement the applicable regulations. This provision is referred to as the "acceptability assessment".

According to the Operations Manual (OM) accompanying the Policy (see 2.8), the relevant operations department reaches an agreement with the ADB's Environment and Social Safeguard Division and the General Counsel (legal department) as to who in the ADB is responsible for conducting the equivalency and acceptability assessments (OM Section F1/OP, para. 66). For projects where country safeguard systems are to be used, the project team summarises the plan to apply the country safeguard system in the specific Project Information Document, which is posted on the ADB's website. The main text of the Report and Recommendations to the President¹¹ specifies which safeguard policy areas (environment, involuntary resettlement, or Indigenous Peoples) apply to the projects. It also summarises the main findings from the equivalency and acceptability assessment and lays out any actions the borrower or the ADB must take to achieve and maintain equivalence and acceptability

(OM Section F1/OP, para. 71).

The Policy states that “to the extent possible, the proposal for the strengthening and use of the CSS, together with its justification, is presented in the country partnership strategy or in country partnership strategy progress reports” (SPS, Appendix 6, para. 14). In addition, the Policy commits the ADB to hold in-country consultations with stakeholders, including governments and NGOs, on the equivalency and acceptability assessments. The final equivalency and acceptability assessments must be disclosed on the ADB’s website upon completion (Appendix 6, para. 14).

The Operations Manual falls under the scope of the ADB’s Compliance Review Panel (the second arm of the ADB’s Accountability Mechanism). Violations of the Operations Manual can be investigated by the Compliance Review Panel (OM Section F1/OP, p. 18).

2.7. Prohibited investments

Appendix 5 of the Policy states that certain activities are prohibited and do not qualify for Asian Development Bank financing – see page 18.

2.8. Operations Manual

As is the case with all of the ADB’s policies, the Safeguard Policy Statement is accompanied by an Operations Manual, which serves to provide guidance to ADB staff on how to implement the Policy.

The Operations Manual for the Safeguard Policy Statement (OM Section F1/BP and OP)¹² summarises the Policy, in some instances restates it, and provides additional detail on implementation.

Additional detail is provided in regard to the processing and contents of ADB key documents, such as the Report and Recommendations of the President, which are a summary of a proposed project with an accompanying recommendation in which the Presidents recommends that the ADB’s Board approve the project. In addition, the Operations Manual describes the required contents of legal agreements, and how Project Completion Reports are to be written by ADB project staff, and the role of the Independent Evaluation Department in a Project Performance Evaluation Report.

Prohibited investments¹³

- (i) production or activities involving harmful or exploitative forms of forced labour¹ or child labour;²
- (ii) production of or trade in any product or activity deemed illegal under host country laws or regulations or international conventions and agreements or subject to international phase-outs or bans, such as
 - (a) pharmaceuticals,³ pesticides and herbicides,⁴
 - (b) ozone-depleting substances,⁵
 - (c) polychlorinated biphenyls⁶ and other hazardous chemicals,⁷
 - (d) wildlife or wildlife products regulated under the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁸ and
 - (e) transboundary trade in waste or waste products;⁹
- (iii) production of or trade in weapons and munitions, including paramilitary materials;
- (iv) production of or trade in alcoholic beverages, excluding beer and wine;¹⁰
- (v) production of or trade in tobacco;¹⁰
- (vi) gambling, casinos and equivalent enterprises;¹⁰
- (vii) production of or trade in radioactive materials,¹¹ including nuclear reactors and components thereof;
- (viii) production of trade in or use of unbonded asbestos fibers;¹²
- (ix) commercial logging operations or the purchase of logging equipment for use in primary tropical moist forests or old-growth forests; and
- (x) marine and coastal fishing practices, such as large-scale pelagic drift net fishing and fine mesh net fishing, harmful to vulnerable and protected species in large numbers and damaging to marine biodiversity and habitats.

Notes

- 1 *Forced labour means all work or services not voluntarily performed, that is, extracted from individuals under threat of force or penalty.*
- 2 *Child labour means the employment of children whose age is below the host country's statutory minimum age of employment or employment of children in contravention of International Labor Organization Convention No. 138 "Minimum Age Convention" (www.ilo.org).*
- 3 *A list of pharmaceutical products subject to phase-outs or bans is available at <http://www.who.int>.*
- 4 *A list of pesticides and herbicides subject to phase-outs or bans is available at <http://www.pic.int>.*
- 5 *A list of the chemical compounds that react with, and deplete, stratospheric ozone resulting in the widely publicised ozone holes is listed in the Montreal Protocol, together with target reduction and phase-out dates. Information is available at <http://www.unep.org/ozone/montreal.shtml>.*
- 6 *A group of highly toxic chemicals, polychlorinated biphenyls are likely to be found in oil-filled electrical transformers, capacitors and switchgear dating from 1950 to 1985.*
- 7 *A list of hazardous chemicals is available at <http://www.pic.int>.*
- 8 *A list is available at <http://www.cites.org>.*
- 9 *As defined by the Basel Convention; see <http://www.basel.int>.*
- 10 *This does not apply to project sponsors who are not substantially involved in these activities. Not substantially involved means that the activity concerned is ancillary to a project sponsor's primary operations.*
- 11 *This does not apply to the purchase of medical equipment, quality control (measurement) equipment and any equipment for which ADB considers the radioactive source to be trivial and adequately shielded.*
- 12 *This does not apply to the purchase and use of bonded asbestos cement sheeting where the asbestos content is less than 20%.*

3. Summary assessment of the new Policy

"... two key shortcomings of the Policy could undermine its application: i) vague language has been used in many instances that could be subject to interpretation; ii) the Policy fails to mainstream environmental and social considerations and to embrace safeguards as a comparative advantage rather than a burden."

3.1. Overview

Overall, most policy provisions from the old safeguard policies have been retained and in some cases strengthened in the new Policy. However, the Policy still has some key problems, and in some cases regresses the provisions contained in the old policies. In particular, two key shortcomings of the Policy could undermine its application: i) vague language has been used in many instances that could be subject to interpretation; and ii) the Policy fails to mainstream environmental and social considerations and to embrace safeguards as a comparative advantage rather than a burden.

The following provides more detailed analysis of the new Policy. Most of the information has been drawn from the NGO Forum network analysis.¹⁴

General strengths

Gender

One progressive aspect of the Policy is its mainstreaming of gender considerations. In this regard, the Policy is further advanced than the safeguard policy of any other international financial institution. It raises the bar by explicitly requiring gender sensitive and responsive application of the safeguard policy provisions.¹⁵

For instance, the Policy requires that meaningful consultation is gender inclusive and responsive (for a definition, see the Policy's Glossary). Further, the Policy requires that impact assessments in regard to the environment, involuntary resettlement and Indigenous Peoples must contain an assessment of the specific situation and impacts for women.

Country safeguard systems

In moving towards country systems, the ADB's goal is to increase the capacity and autonomy of borrowing member countries. This is welcome and consistent with the Paris Declaration. If countries can start applying their own, rigorous safeguard policies, then

affected communities will ideally be better served and long-term development outcomes improved. It must be noted, however, that in the recent past, some of the ADB's capacity building attempts have failed due to unwillingness from borrowing governments. The hope that governments will embrace capacity building is not necessarily realistic.¹⁶

General shortcomings

Country safeguard systems

As a result of recommendations by members of NGO Forum on ADB, the Policy now contains a phased approach to the application of country safeguard systems. However, even though the Policy outlines a schedule for the review of the application of a limited number of cases after three years, there is no provision stating that country systems will only be fully rolled out if the findings of the review are positive.

During the Policy review phase, ADB senior staff assured civil society organisations and Board members that the application of country systems to a particular project had to be approved by Board members for every case where country systems were being considered. The Policy fails to state this, leaving a loophole in regard to Board oversight of application of the country systems approach on a project-to-project basis.

The following section provides a brief overview of the remaining strengths and shortcomings of the specific safeguard policy areas.

3.2. Environment

Strengths

Cumulative and transboundary impacts

While falling short of requiring integrated environmental management of project design and planning, the Policy requires that transboundary and cumulative global environmental impacts of projects are evaluated in the environmental assessment process (SPS, p. 16, 2).

Shortcomings

Loopholes pertaining to pollution

The environment safeguard requirements fail to put in place effective provisions against pollution, as even high risk projects are allowed under exemption clauses. For instance, the borrower is required to apply pollution prevention and control technologies and practices consistent with international good practice, such as the World Bank Group's Environment, Health and Safety Guidelines. However, in "view of specific project circumstances", the Policy allows the borrower to apply less stringent levels of pollution prevention as long as a justification is provided. The Policy fails to define what specific project circumstances are considered as justifiable (SPS, Appendix 1, para. 33).

In addition, the Policy falls short of prohibiting structural elements or components of projects (eg dams, tailings, ash ponds) in high risk locations where their failure or malfunction may threaten the safety of communities. Instead it merely requires the borrower to engage qualified experts to conduct a review "as early as possible in project development and throughout project design, construction, and commissioning". This wording does not indicate that a project component would be stopped or redesigned if findings of the review indicate a continued potential threat (SPS, Appendix 1, para. 44).

Integrated management – environmental accounting

The Policy only makes marginal reference to environmental costing (SPS, Appendix 1, para. 4). Overall, the Policy fails to acknowledge that if not avoided or mitigated in planning, environmental costs can not only undermine the long-term sustainability of particular projects, but also development in general. This minimum standard approach taken by the Policy is likely to undermine the ADB's long-term goal of sustainable development and poverty reduction, if project design and planning is not significantly improved in regard to environmental accounting.

The Policy also fails to mainstream environmental considerations in project and integrated project planning. The ADB has separate project accounting methods which are not referenced in the Safeguard Policy Statement. In terms of international best practice, the failure to integrate environmental accounting into the Policy is a major shortcoming and is likely to undermine sustainable development outcomes.

3.3. Involuntary resettlement

Strengths

Requirement for improved living standards of poor and vulnerable groups post project

In regard to involuntary resettlement, the Policy requires that for poor and vulnerable displaced groups, the standards of living must be improved. (SPS, Appendix 2, para. 3) This is an improvement over the old involuntary resettlement policy, which merely had restoration (not improvement) of livelihoods as a minimum benchmark. Another advance over the old involuntary resettlement policy is the requirement for the borrower/client to provide opportunities for benefit sharing for displaced people. Benefit sharing refers to affected people deriving opportunities and shares from the project, such as from revenues generated through mining projects (SPS, Appendix 2, para. 13).

Shortcomings

Restricted scope

The Policy narrows the scope of the old involuntary resettlement policy. The new Policy ties the trigger for compensation and protections under the resettlement safeguard requirements to physical and economic displacement that is caused by land acquisition or land use restrictions in parks or protected areas. Any other physical or economic displacement is covered under the provisions of the environmental safeguard requirements, which are not equipped to address the unique social and impoverishment risks of displacement.

While the Policy includes a provision stating that "if these [non-land-acquisition-related] impacts are found to be significantly adverse at any stage of the project, the borrower/client will be required to develop and implement a management plan to restore the livelihood of affected persons to at least pre-project level or better" (SPS, Appendix 2, para. 6). This clause may serve to bring a few cases of non-land-acquisition-related displacement under the coverage of the involuntary resettlement safeguards, but the provision is subject to interpretation. The failure to define "significantly adverse" will mean that most such cases will fall under the environmental safeguards.¹⁷

Resettlement related impacts, such as downstream impacts on communities from hydropower projects, are an example of where economic displacement

will be shifted from the involuntary resettlement requirements to the less appropriate environmental safeguard requirements. In this very real scenario, riparian communities downstream of a dam may be forced to move and change their fishing and livelihood practices because of changes to the river's natural flows caused by the project operation. With the new Policy this situation would only be addressed via the environmental safeguards.

Negotiated agreements replace provisions of Policy

The Policy encourages the borrower/client to reach negotiated agreements with affected people in regard to resettlement mitigation and compensation measurements. Negotiated agreements are desirable and NGOs pushed for the inclusion of this provision. However, according to the Policy, if a negotiated agreement is reached, the provisions of the Policy no longer apply, but are replaced by the provisions in the negotiated agreement (SPS, Appendix 2, para. 25). This is problematic, if the provisions of agreements do not meet the requirements of the Policy.

Better practice: the 1995 Involuntary Resettlement Policy

The ADB's old Involuntary Resettlement Policy (1995) represents better practice in regard to economic displacement, as it stipulates that:

"If individuals or a community must lose their land, means of livelihood, social support system, or way of life in order that a project might proceed, they should be compensated and assisted so that their economic and social future will generally be at least as favourable with the project as without it" (para. 34, (iii)).

The Operations Manual Section F2 on Involuntary Resettlement (2006) states under Scope of the Policy:

"Replacing what is lost. If individuals or a community must lose all or part of their land, means of livelihood, or social support system, so that a project may proceed, they will be compensated and assisted through replacement of land, housing, infrastructure, resources, income sources, and services, in cash or kind, or that their economic and social circumstances will be at least restored to the pre-project level"(OM, BP, D, para. 4, iii, p. 2).

Dilution of entitlements for displaced people without title

The Policy provides fewer entitlements to affected people who lack legally recognisable land titles. The Policy only provides that people without titles are eligible for compensation of non-land assets, but not for compensation of lost land (SPS, Appendix 2, para. 8). In this regard, the Policy is weaker than the old involuntary resettlement policy, which stipulated that absence of title did not prohibit access to ADB policy entitlements in regard to replacement of lost land.¹⁸

3.4. Indigenous Peoples

Strengths

Commitment not to finance projects in the absence of broad community support

The Policy represents a strengthening over the old indigenous peoples policy by stipulating that the ADB will not finance a project where broad community support does not exist (SPS, para. 55).

Referencing of United Nations Declaration on the Rights of Indigenous People

The Policy references the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and as such, is the only current multilateral safeguard policy that recognises the significance of the international declaration and its recent ratification (SPS, para. 33).

Shortcomings

Failure to consistently integrate the principle of free, prior and informed consent

Even though the Policy references UNDRIP, it fails to fully integrate the principle of free, prior, informed consent, as enshrined in the UNDRIP. The new Policy states that under certain circumstances (see Section 2.4.), free, prior, informed consent is required in projects and programs affecting Indigenous Peoples. However, "free, prior, informed consent" is redefined as "a collective expression by the affected Indigenous Peoples communities, through individuals and/or their recognized representatives, of broad community support for the project" (SPS, Appendix 3, para. 31).

According to representatives of Indigenous Peoples networks, this redefinition undermines the consistent application of free, prior, informed consent. A coalition of Indigenous Peoples' representatives submitted a letter to the ADB outlining their concerns regarding "broad community support":

"Resettlement related impacts, such as downstream impacts on communities from hydropower projects, are an example of where economic displacement will be shifted from the involuntary resettlement requirements to the less appropriate environmental safeguard requirements."

"CONSENT is a matter of collective decision-making taking place in the context of a reiterative process of discussion and negotiation, while broad community support is merely an interpretation of the result of a consultation process where indigenous peoples can express their views and opinions. ADB interpreting broad community support from a consultation is NOT a process of consent, and therefore the provision for free, prior and informed consent in the (Policy) does not provide for consent. Even within the application of broad community support as an inadequate standard, there are no clear indicators of how broad community support will be judged to have been achieved by the ADB. There is also no mechanism provided in case affected indigenous peoples' communities disagree or have serious concerns with the Bank's interpretation of CONSENT through 'Broad Community Support'.¹⁹

Limited scope of application of free, prior, informed consent / broad community support

Instead of requiring free, prior, informed consent (defined by the ADB as broad community support) for all projects involving Indigenous Peoples, the Policy limits the application of free, prior, informed consent/ broad community support to the three types of project impacts: i) commercial development of the cultural resources and knowledge of Indigenous Peoples; ii) physical relocation from traditional or customary lands; and iii) commercial development of natural resources on lands used by Indigenous Peoples that has an impact on the livelihoods, or on cultural, ceremonial, or spiritual uses, that define the identity and community of Indigenous Peoples (SPS, Appendix 3, para. 30).

During the Policy review process, the same coalition of Indigenous Peoples representatives as mentioned in the section directly above requested that the application of free, prior, informed consent/broad community support be extended to projects involving health and education activities for Indigenous Peoples,²⁰ but the final policy fails to include these types of projects.

3.5. Financing modalities

Shortcomings

Lack of increased staff resources

Generally, for all the types of lending outlined under the section on different financing modalities (program lending, project lending, multi-tranche financing facilities, emergency assistance loans, financial intermediary loans and loans or investments in general corporate finance) there is a reduction in transparency, oversight and requirements for due diligence in regard to environmental and social impacts. The ADB is using these modalities more and more and claims that they are efficient. These types of loans often involve large upfront funding. It is not clear from the Policy whether there will be a proportionate increase in staffing resources to monitor the increased risks associated with such financing modalities. The section on resource implications (SPS, paras. 76 – 80) in the Policy merely suggests incremental staff increases. However there is no provision that stipulates that the increased staff time must go towards monitoring the increased potential risks around special financing modalities.

Ambiguous definition of financial intermediaries

The Policy fails to specify that all financial intermediaries, regardless of the type of financing (eg loan, equity, credit-line, and guarantee), are in fact classified as financial intermediaries and are thus subject to the relevant requirements that apply to this group. In addition, the definition of "general corporate finance" is very broad, applying to all loans and/or investments not earmarked for specific subprojects. This means that investments and projects for general support fall under "general corporate finance", which has less stringent requirements (SPS, Appendix 4, paras. 17 – 20).

Best practice: World Commission on Dams Recommendation on FPIC

The World Commission on Dams proposes a process in which free, prior, informed consent (FPIC) is obtained in regard to dam projects. Strategic Priority 1 of the World Commission on Dams final report states that public demonstrated acceptance by affected people must be gained – in particular from Indigenous and tribal peoples, women and other vulnerable groups. Such demonstrated acceptance is to be reached through negotiated agreements that are legally binding.¹

A more recent statement by the United Nations Special Rapporteur on Indigenous Peoples, James Anaya, further refines the principle of free, prior, informed consent as follows:

65. The specific characteristics of the required consultation procedures will vary depending on the nature of the proposed measure, the scope of its impact on indigenous peoples, and the nature of the indigenous

interests or rights at stake. Yet, in all cases in which the duty to consult applies, the objective of the consultation should be to obtain the consent or agreement of the indigenous peoples concerned. Hence, consultations should occur early in the stages of the development or planning of the proposed measure, so that indigenous peoples may genuinely participate in and influence the decision-making.²

Notes

- 1 Dams and Development: A New Framework for Decision-Making: The Report of the World Commission on Dams, November 2000, p. 215, http://www.unep.org/dams/WCD/report/WCD-_Dams%20report.pdf
- 2 Anaya, J. 2009, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms on indigenous people, UN General Assembly, Human Rights Council, 15 July, pp. 21 & 22

3.6. Operations Manual

Strengths

The Operations Manual provides a fairly clear chain of command for ensuring safeguard policy compliance with defined roles of the different departments within the ADB, such as project teams, the operations department, the Environment and Social Safeguard Division, and the Chief Compliance Officer.²¹

Shortcomings

According to the ADB website, the Operations Manual “includes operational procedures that spell out procedural requirements and guidance on the implementation of policies.”²² During the policy review phase, ADB management repeatedly emphasised that one key driver for the review was the desire to make implementation clearer. Civil society organisations lobbied hard during the review to provide clarity in the Safeguard Policy Statement resulting in much improved requirements and language. However, in some instances (see above) the Policy remains vague. It was hoped that the Operations Manual, which was not published until six months after the Policy was approved, would provide additional clarity for implementation. Civil society organisations provided

recommendations for improvement²³ to the ADB, but management refused to take any input (except for one minor correction), claiming that the Operations Manual was an internal document.

The Operations Manual fails to provide clear guidance in important areas. Ambiguous language is still found within the provisions, such as “to the extent possible....” (OM F1/OP para 13) and “appropriate expertise” (OM F1/OP, para 14).

Most importantly, in the area of consultation and participation, the Operations Manual lacks clear provisions on how meaningful consultation is to be implemented. Apart from reiterating the definition of meaningful consultation in the Policy (see Section 2.1, General Policy requirements, p.9), the Operations Manual does not detail how to ensure that concerns of affected people are adequately addressed in project design and safeguard plans (OM Section F1/OP, para. 19).

In refusing to consider civil society recommendations and to provide a clearly worded Operations Manual, the ADB missed a vital last opportunity to ensure more effective implementation of the new Safeguard Policy Statement.

4. Implications for civil society organisations

4.1. Resistance to arbitrary interpretation

As indicated in the section above, much of the language in the Policy is subject to interpretation. This means that the role of civil society organisations in monitoring the Policy and ensuring that the ADB abides by the language and spirit of the Policy could be instrumental. Civil society organisations should not be deterred by the use of vague language in the Policy. The ADB's policy principles commit the Bank and the borrower to good faith application of the Policy's provisions. Therefore, the Bank must be expected to fulfil the Policy and not to use arbitrary language as loopholes to avoid complying with its Policy requirements, which are binding.

The provisions around consultation are an example of how important it will be for civil society organisations to ensure that the Policy is fully implemented in language and in spirit. Civil society organisations, affected people, the borrower/project implementer and the ADB may well have differing understandings on what it means to "incorporate all relevant views of affected people ...into decision-making". If civil society organisations and affected people believe that their views have not been incorporated, the wording of the Policy, in allowing flexibility to the ADB, also gives civil society organisations and affected people the possibility to challenge the Bank's interpretation and to present contrary evidence.

4.2. Particular attention to different types of investment/financing modality

The ADB is increasingly using financing modalities other than traditional project financing. As most program and sector lending, multi-tranche finance facilities and financial intermediary lending have more flexible safeguard requirements than traditional projects, it is essential that the ADB has in place enhanced monitoring and reporting in this area. Alongside any commitment that may be made by

the ADB in this area, civil society organisations and external stakeholders, such as donor governments, could independently monitor the implementation of safeguard requirements for these types of projects. In particular, it will be important to request the respective framework documents and audits stipulated in the Policy. If external monitoring reveals that the newly introduced modalities and flexibilities lead to poor safeguards implementation, civil society organisations can challenge the ADB in this regard and the Bank can be expected to remedy poor implementation.

4.3. Particular attention to application of country safeguard systems

The new Policy allows the ADB to introduce country safeguard systems in selected sectors and countries during the first three years after the date of effectiveness of the new Policy (2010 – 2013). Civil society organisations have a significant role to play in independent monitoring of this process.

When a project or program is selected for country safeguard systems application, civil society organisations can do an independent verification of the ADB's equivalency and acceptability test. In particular, national organisations, in countries where the ADB is proposing to use country systems, may want to closely track the ADB's process. The consultations required on the equivalency and acceptability tests, and the disclosure of these assessments, will be critical opportunities for civil society organisations to monitor and influence individual country safeguard systems application processes.

It is also important to note, that while not explicitly required by the Policy, the ADB's Board of Directors must approve the application of country safeguard systems for each project on a case-by-base basis. The Board's role in the phased introduction of country systems can potentially allow civil society organisations to have a good point of access to, and leverage over, the process.

4.4. Monitoring of safeguards implementation in the ADB's response to the financial crisis

One of the ADB's main responses to the global financial crisis of 2008 was to reaffirm its commitment to infrastructure-led growth. The paper describing the ADB's response to the financial crisis contains the following statement in regard to infrastructure financing:

"ADB will be flexible in financing identified shovel-ready infrastructure projects. To deliver stimulus, these projects need to start soon – or already be under way. ADB will consider increasing its share of financing for ongoing infrastructure projects and simplify feasibility analysis and approval processes. It will also examine possibilities for financing infrastructure operations and maintenance, another quick-start option."²⁴

The Bank's emphasis on a rapid disbursement of funds and upfront financing as a response to the global financial crisis raises concerns that safeguards provisions may be or may have been dispensed of in favour of speed. Civil society organisations should pay particular attention to infrastructure projects classified as "financial crisis response" by the ADB and monitor any deviation from, or lack of application of, the new Policy.

4.5. Documenting poor policy implementation

From 2004 – 2007 the ADB's lending volume averaged USD \$7.7 billion. Since 2007, this figure has risen, with a new boost to the Bank's general capital in 2009. Almost all of the Bank's investments have direct impacts on communities. In cases where there are negative project impacts, a select few of these come to attention of local, national, regional and/or international civil society organisations. The majority of projects which have negative impacts on communities and the environment are likely going unnoticed other than by the people directly affected (and the ADB or the relevant staff from the implementing government). In cases where civil society organisations do have access

to information on inadequate policy implementation, or where there has been a complete failure to implement, it would be extremely valuable to document this. Such collection of information can be done with a view to: i) most importantly, bringing projects back into compliance and thereby reducing harm (see next section); ii) informing the review of the new Policy that is scheduled for 2013.

4.6. Utilisation of the Accountability Mechanism

The ADB's Accountability Mechanism consists of two arms: the Special Project Facilitator and the Compliance Review Panel. The role of the Compliance Review Panel is to investigate whether the Bank has complied with all of its operational policies, including the new Safeguard Policy Statement.

In order to access the Accountability Mechanism, affected communities must demonstrate that they have suffered material harm and that they have attempted to obtain a resolution from, and action by, the project and/or country staff. If they feel that an action or resolution of the issue is unsatisfactory, then the affected communities can approach the Accountability Mechanism. The first step under the Accountability Mechanism is to undergo a problem-solving phase with the Special Project Facilitator. If the affected communities are dissatisfied with the outcome of the process with the Special Project Facilitator, they have the option of taking their complaint to the Compliance Review Panel for an investigation of the ADB's policy compliance.²⁵

In theory, the Accountability Mechanism is the ADB's mechanism to hold the Bank accountable to its policies. However, the mechanism's process is very lengthy, and currently only affected persons can file a complaint. In most cases, affected communities are more interested in redress than proving policy compliance. Therefore, the mechanism has only limited usefulness for external stakeholders monitoring policy compliance. However, the review of the Accountability Mechanism is overdue, and is expected to commence by mid 2010. Thus it is possible that changes in this regard will be made in the future.

5. Conclusion

In current times, when the poor are facing the combined impacts of the financial crisis, the food crisis and the climate crisis, the ADB's Safeguard Policy Statement is more important than ever. The Policy is vital in ensuring that vulnerable communities do not suffer from ADB operations from which they are intended to benefit; and that the environment is not exploited or diminished as a result of the ADB's development projects.

While external stakeholders such as civil society, member governments and academics have a role in monitoring the ADB's policy implementation, the ADB itself is obliged to ensure that borrowers and clients adhere to both the language and spirit of the Policy. During the policy review process, ADB management often stated that flexibility was important for effective implementation. It also stated that safeguard requirements would not be undermined, as long as borrowers and clients adhered to Policy principles. This approach requires good faith on all sides. It is now up to the ADB to ensure that the principles are indeed implemented and that flexibility is used as an advantage for better safeguard implementation and not as an excuse for failure to implement policy provisions.

The Safeguard Policy Statement, while maintaining most of the core requirements for protecting affected people and the environment, fails to present safeguards as a comparative advantage and cornerstone for long-term sustainable development. While the Safeguard Policy Statement will not be reviewed until 2013, the ADB could still begin to change its attitude towards safeguards, by starting to perceive them as a means of ensuring sustainable long-term development outcomes rather than as a burden. The ADB has the opportunity to mainstream safeguard considerations into its operations beyond the application of the fairly narrow scope of the Policy. Oxfam hopes that the Bank will begin to do so, and that communities and the environment will begin to benefit from such a proactive approach.

Endnotes

- 1 Asian Development Bank. Safeguard Policy Statement (SPS), Policy Paper, June 2009. Available at: <http://www.adb.org/Documents/ Policies/Safeguards/Safeguard-Policy-Statement-June2009.pdf>
- 2 The ADB's term for the review process is Safeguard Policy Update. However, this term gives the impression that only minor changes were made to the existing safeguard policies, which is inaccurate. This report uses the term "review" deliberately.
- 3 NGO Forum on ADB, *Comments of the Forum on R-Paper of the Safeguard Policy Statement*, 14 July 2009. NGO Forum on ADB, *Detailed recommendations for the improvement of the SPS R-paper*, 15 July 2009. Both available at: <http://www.forum-adb.org/inner.php?sec=13&ref=extras&id=100>
- 4 www.adb.org/Documents/Policies/Involuntary_Resettlement/default.asp?p=rstlmnt
- 5 www.adb.org/Documents/Policies/Indigenous_Peoples/default.asp
- 6 www.adb.org/documents/policies/environment/default.asp?p=policies
- 7 International Accountability Project 2009. Unpublished.
- 8 For detailed information on how to use the ADB's Accountability Mechanism, go to: ADB Toolkit: Unpacking the ADB, NGO Forum and Bank Information Centre 2008. Available at: www.forum-adb.org/BACKUP/pdf/toolkits/unpacking-2008.pdf
- 10 Projects considered highly risky or contentious or (involving) serious, multidimensional and generally interrelated potential social and/or environmental impacts. (SPS, Glossary)
- 9 That is, compulsory acquisition.
- 11 This is the ADB document in which the project is explained and summarised and with which the President seeks the Board's approval for the project.
- 12 Asian Development Bank, OM Section F1/BP, Safeguard Policy Statement, 2010.
- 13 Asian Development Bank. Safeguard Policy Statement (SPS), Policy Paper, June 2009, Annex 5
- 14 NGO Forum on ADB, *Comments of the Forum on R-Paper of the Safeguard Policy Statement*, 14 July 2009. NGO Forum on ADB, *Detailed recommendations for the improvement of the SPS R-paper*, 15 July 2009. Both available at: <http://www.forum-adb.org/inner.php?sec=13&ref=extras&id=100>
- 15 Comments of the NGO Forum on ADB on the Review Paper of the Safeguard Policy Statement of the Asian Development Bank, 14 July 2009.
- 16 For more information see: International Accountability Project, Oxfam Australia & the Center for International Environmental Law, *Dangers of an Untested CSS: Lessons from the Cambodian Sub-decree on State Land Acquisition*, February 2009. Available from: enquire@oxfam.org.au
- 17 For more details, see: Burstein MD & Kalafut J. *Defining Away a Problem: How a Few Words Narrowed the Scope of the ADB's Involuntary Resettlement Policy*, , Focus Asien, No. 34, Asienhaus, October 2009.
- 18 Asian Development Bank. Involuntary Resettlement Operations Manual F2, 2006, Operational Procedures, B. para. 9, p. 3.
- 19 Asian Indigenous Peoples' Pact Foundation (AIPP), Aliansi Masyarakat Adat Nusantara (AMAN), Aliansi Masyarakat Adat Nusantara (AMAN), Aliansi Masyarakat Adat Nusantara (AMAN), Chin Human Rights Organization, Secretary-Foreign Affairs, Nepal Federation of Indigenous Nationalities (NEFIN), Tebtebba Foundation (Indigenous Peoples' International Centre for Policy Research and Education) – Philippines, Forum for Indigenous Perspectives and Action, Center for Development Programs in the Cordillera – Cordillera Peoples Alliance, North East Peoples' Alliance on Trade, Finance and Development. Submission to ADB on Safeguard Policy Statement W-paper, 3 February 2009.
- 20 *ibid*
- 21 NGO Forum on ADB, February 2010, Comments by the NGO Forum on the ADB on the Operations Manual of the new Safeguard Policy Statement of the Asian Development Bank, www.forum-adb.org/docs/OMSPScomments021010.pdf
- 22 www.adb.org/About/other-operational-policies.asp
- 23 NGO forum on ADB, February 2010
- 24 The Global Economic Crisis: Challenges for Developing Asia and ADB's Response, May 2009, www.adb.org/Documents/Reports/Economic-Crisis/default.asp
- 25 For more detailed information on how to use the ADB's Accountability Mechanism, go to: ADB Toolkit: Unpacking the ADB, NGO Forum on ADB and Bank Information Center 2008. Available at www.forum-adb.org/BACKUP/pdf/toolkits/unpacking-2008.pdf

Appendix 1

Overview of policy review process

The ADB first announced its intention to revise its safeguard policies with a web posting in July 2005. The ADB deliberately referred to this process as an “update” rather than a review, which is the traditional term used by ADB when a policy is amended. ADB’s rationale was that it was merely updating its safeguard policies in light of the changing “lending environment” and borrower requirements. The ADB was quite frank in stating that the “update” was occurring due to pressure from borrowers to remove the burdensome and allegedly costly safeguard policies.

The context of the review in this sense has been different from other policy reviews. Most of ADB’s newer policies include a revision scheduled three to five years after the Policy becomes effective. Two of the ADB’s safeguard policies, the ones on involuntary resettlement and Indigenous People, were very old and long overdue for a review to bring them up to par with current best practice. Another unusual feature of the review was that it was to deal with three different policies and consolidate them into one document.

The ADB’s underlying rationale for the so-called Safeguard Policy Update naturally caused concern among civil society members. The Bank’s proclaimed aim was “to enhance the effectiveness of its safeguard policies, and ensure the relevance to changing client needs and new lending modalities and instruments”. In its first consultation draft, the ADB stated the following goals for the policy review process: (i) articulation of the safeguard requirements to improve their clarity, coherence and consistency; (ii) balancing a front-loaded procedural approach with one more focused on results during implementation; (iii) making policy implementation more adaptable in practice to match an evolving range of lending products and innovative financing modalities; (iv) working towards greater harmonisation with safeguard practices across MFIs and tailor safeguard approaches to different clients with different capacities; and (v) improving internal processes and resource allocation. This language did little to disguise ADB’s intention to make the safeguard policies easier, quicker and cheaper to remain attractive to borrowing member countries.

Recognising the threat that weakened safeguards would pose to affected communities, the NGO network monitoring ADB projects and policies joined together in an unprecedented coordinated campaign. The network’s aim was two-fold. The ideal objective was to influence the review process in such a way that the policies would be significantly strengthened. The bottom-line position of the network was to prevent a regression of the ADB’s existing three safeguard policies. To do this, the network engaged a range of strategies, adapting them according to ADB’s responses.

Early on in the review process, even before the official announcement, civil society organisations were in discussion with the ADB about the best format and process for the review. The NGO Forum on ADB network and its members, including Oxfam Australia, provided written comments on the ADB’s discussion note which was posted in October 2005. NGO Forum members were also instrumental in pushing the ADB to conduct evaluations of the implementation and effectiveness of its current safeguard policies before drafting the new proposed policy. These evaluation studies were conducted by the ADB’s semi-independent Independent Evaluation Department from mid-2006 to early 2007. NGO Forum members provided written feedback on these evaluations.

In October 2007, the ADB posted a consultation draft of the Safeguard Policy Statement. An assessment of the draft by civil society organisations, including Oxfam, found that its poor quality was alarming and that it represented a major regression from ADB’s existing policies. In addition, given that out of a series of regional consultations, the first consultation was very poorly managed, NGO Forum members concluded that the consultation draft did not provide an adequate basis for meaningful consultations. NGO Forum members, including Oxfam, refrained from attending any further consultations and called for a halt to consultations until there was a second, revised draft. The ADB went ahead with the remaining consultations, which concluded in April 2008. Civil society representation at these consultations was considerably reduced, given the NGO Forum members’ decision not to participate.

However, NGO Forum members, including Oxfam, very clearly stated that they were not withdrawing from the process overall, and demonstrated this by providing detailed written comments on the first consultation draft.

Due to mounting pressure, including media coverage in the international financial media, the ADB finally conceded and issued a second consultation draft on 3 October, 2008. This was followed by a regional multi-stakeholder consultation from 18 to 21 November 2008 in Manila.

Meanwhile the public exposure of the weaknesses of the review process led to the ADB president repeatedly making a public commitment to “no weakening” of the existing safeguard policies. The second draft showed improvements in this regard, but still fell short of preserving all existing safeguard provisions. NGO Forum members provided comments during the Manila consultation as well as extensive written comments.

Largely due to the intervention of civil society organisations, the subsequent draft, the so-called “W-Paper” (Working Paper) of the Safeguard Policy Statement, showed significant improvement. However NGO Forum members found that in eight key areas the Policy Statement still was weaker than the existing policies. NGO Forum members then lobbied ADB management and the Board to include these areas. The subsequent draft,

the so-called “R-Paper” (Recommendations Paper), took up most of NGO Forum’s recommendations. As a result, the final policy that was approved was much stronger than the initial drafts. While there are still instances in which the Policy is inconsistent with the old policies, in some areas, the new Policy shows improvement over the old policies (see Sections 2 and 3 for details). The remaining weaknesses can be addressed by clarifications in the accompanying Operations Manual.

Looking back at the campaign of civil society organisations, it can be said that the bottom line goal of preventing a weakening of ADB’s safeguard policies was achieved in most key areas. The intervention of NGO Forum members, including Oxfam, prevented the ADB from substantially weakening the existing policies. In terms of the ideal goal, the campaign was less successful. While there are some improvements in the new Policy, it falls short of embracing international best practice in regard to environmental and social impacts of projects. Regrettably, the policy update process demonstrated that the ADB still considers safeguards as a burden, as retention of existing policy provisions and improvements proved to be an extremely hard-fought battle. The ADB has yet to change its mindset and treat effective safeguard provisions as a comparative advantage and cornerstone to good governance and sustainable long-term development.

