

Summary of Concerns regarding the ADB's Draft Safeguard Policy Statement:

Unacceptable Weakening of ADB Environmental and Social Standards

**Concerns regarding the Continuation of Public Consultations Based on Deeply
Flawed and Missing Documents**

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Executive Summary
Summary of Concerns regarding the ADB's Draft Safeguard Policy Statement:

Unacceptable Weakening of ADB Environmental and Social Standards

Concerns regarding Proposed Continuation of Public Consultations Based on Deeply Flawed and Incomplete Documentation

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Since 2005, civil society organizations affiliated with the NGO Forum on the Asian Development Bank have engaged in discussions with the Asian Development Bank (ADB) as the Bank has proposed a process for redrafting existing ADB policies designed to provide safeguards for project-affected peoples and the environment. The participation of civil society groups in this process has been predicated on the ADB's stated commitment to ensure that the Safeguard Review Update process and the resulting new Safeguard Policy Statement (SPS) – designed to replace existing safeguard policies – would not lead to the weakening of ADB environmental and social policies. In July 2007, a draft “internal” version of the proposed SPS was circulated and a number of groups prepared initial analyses of this document. We were disturbed to note that this draft proposed substantial weakening of existing ADB protections. The draft was revised and, in late October 2007, a lengthy SPS “Consultation Draft” was released, ostensibly to serve as a focus for public consultation meetings beginning approximately two weeks after the release of the draft.

This report consists of a compilation brief summaries of the extent to which **the ADB's SPS draft represents an unacceptable weakening of existing environmental and social safeguards and is unsuitable as a basis for continued public consultation unless it is completely re-drafted to, at a minimum, maintain existing social and environmental safeguards and meet best international practices at peer institutions as outlined in the enclosed summary papers.** Detailed analyses of various aspects of the SPS have been drafted by the Bank Information Center, the Center for International Environmental Law, Environmental Defense Fund, the Forest Peoples Programme, and the International Accountability Project. Summaries of these analyses are provided herein. Full versions of the analyses are available from each of the authors.

Dramatic weakening of existing ADB standards, despite ADB guarantee of “no weakening”

Despite the ADB's publicly announced guarantee that the new Safeguard Policy Statement (SPS) would not lead to the weakening or elimination of social and environmental protections currently provided under existing ADB safeguard policies, the October 2007 SPS Consultation Draft represents a dramatic weakening of the majority of existing ADB safeguard policies. Essentially, this draft SPS **eviscerates the ADB's detailed and currently mandatory safeguards and replaces them with one page each of mandatory vaguely worded “policy principles”** for environmental, Indigenous Peoples and involuntary resettlement safeguards. These “policy principles” are much weaker than existing requirements and subject to wide interpretation. The October “Consultation Draft” represents an even further weakening of the July 2007 draft SPS which was also, for the most part, weaker than existing standards.

Elimination of most mandatory implementation requirements?¹

The detailed pages of ADB policy implementation measures which are currently mandatory have been replaced with “General Requirements” for all safeguards (Environment, Involuntary Resettlement, Indigenous Peoples) which are far weaker, for the most part, than existing safeguard implementation requirements. In the October

¹See ADB Eliminates Mandatory Implementation Requirements for Safeguards, Environmental Defense, stephf99@gmail.com

2007 SPS draft, these new “delivery mechanisms” for ADB safeguard policies are described in 46 pages of detailed requirements for ensuring implementation and compliance. However, due to careful language changes made in the Draft SPS, these requirements appear to be *no longer mandatory or are now so vaguely written as to be unenforceable*.

Senior ADB officials who are deeply concerned about the direction of the SPS process have indicated to us that “effectively nothing is mandatory because there is so much flexibility in what is done.” According to these officials, the SPS dramatically compromises the ADB's ability to ensure compliance “because the entire thing is unclear, filled with vague language, with a lack of clear statements about exactly what is required and how requirements will be operationalized.” The lack of clearly mandatory, enforceable safeguard implementation measures (“delivery mechanisms”) represents a complete reversal of ADB's core safeguard requirements, and is a potentially devastating blow to the environment and project-affected communities.²

Strong language pertaining to compliance has been replaced with language assuring borrowers that failure to comply with requirements will not necessarily result in penalty. For example, the earlier July 07 Draft SPS stated “If compliance with the safeguard policies still is not met after these remedies, ADB will suspend financing until noncompliance is rectified or cancel the project.” However, in the October 2007 consultation draft, this language has been removed and replaced with language assuring borrowers that “Resorting to legal remedies in the event of noncompliance is not automatic or mandatory when a borrower fails to comply.” Such statements send a clear signal that borrowing countries need not be overly concerned about compliance with ADB social and environmental safeguards.

Failure to protect rights of Indigenous Peoples, weakening of existing ADB protections³

During the Indigenous Peoples’ consultation, deep concerns were raised regarding core flaws in the SPS document. According to the Forest Peoples Programme, the SPS “fails to meet existing standards on safeguard measures for indigenous peoples on a number of key, significant points.” In addition, the draft SPS fails to apply relevant international agreements, legal norms and laws and “represents a weakening of already unacceptably low standards within the Bank.” The new language weakens the standard of consent currently required of Indigenous communities by the ADB and does not require free, prior and informed consent for activities which impact Indigenous Peoples. The Forest Peoples Program analysis highlights concerns among Indigenous representatives regarding the proposed application of “country systems” and “framework” approaches, finding that there is “no practical way” to implement such systems with full involvement of project affected peoples.

Environmental safeguards weakened – elimination of 120 day public comment period⁴

Environmental standards and implementation requirements (“delivery mechanisms”) have been weakened in all sectors of ADB operations, including project loans, program loans, sector loans, corporate investments, financial intermediaries, and co-financing. The current requirement that Environmental Assessments be carried out for “all project components whether financed by ADB, co-financiers, or the borrower” has been eliminated as has been the existing requirement for the assessment of “indirect and cumulative impacts” and the requirement for a 120 day public comment period. The new policy proposes no specified minimum public comment period at all. There has also been a direct weakening of:

- the ADB's role and responsibilities, borrower obligations
- public consultation and participation requirements
- information disclosure requirements
- monitoring, reporting, due diligence, and review requirements
- definition of “external experts” (to avoid conflict of interest problems), “project area of influence”
- requirements pertaining to changes in project scope, “uncertainties in location”, etc.

²For details, see S. Fried, “Elimination of Mandatory Implementation Requirements for Safeguards?”, January 2008

³ See detailed reports by Forest Peoples Programme at http://www.forestpeoples.org/documents/ifi_igo/bases/adb.shtml

⁴ See detailed reports by Environmental Defense, stephg99@gmail.com or <http://www.bicusa.org/en/Article.2851.aspx>

Involuntary Resettlement: Fundamentally flawed⁵

According to the International Accountability Project (IAP), the weakening of ADB safeguard policies and the fact that the draft SPS is far below existing international standards and comparable lending institutions “suggests a lack of good faith on the part of ADB management, and constitutes a failure to ensure that projects are designed to ensure poverty alleviation and are based on democratic decision-making processes, respect for human rights and a commitment to ensure not only a lack of harm but, indeed a benefit, to those displaced by ADB projects.”

According to IAP, “the ADB’s policy on resettlement is critically important to millions of people across Asia. It is well established that involuntary resettlement leads to impoverishment of affected people unless comprehensive measures are taken to ensure otherwise. The proposed involuntary resettlement provisions of the draft SPS endanger displaced people with much greater risks of life-threatening impoverishment. **The ADB, as a public institution with a mandate to promote poverty alleviation, must ensure that its lending activities do not result in ‘involuntary impoverishment’ of the vulnerable populations that its projects displace.** It is thus essential that the ADB establish robust safeguard policies that effectively prevent impoverishment. In this regard, the current draft SPS, as well as the process by which it was haphazardly assembled, are woefully inadequate. **Given the fundamental flaws in substance and process of the SPS, we reject the proposed SPS in its entirety and call for a comprehensive overhaul of the document and revision process.**”

The above analyses reveal direct violations of the ADB’s guarantee that the new SPS process will not lead to any weakening of standards, thus rendering the current draft unacceptable and unsuitable as a basis for public comment.

ADB SPS is far weaker than international standards.⁶

Many of the protections provided in the current draft are, in addition to being significantly weaker than existing ADB standards, far below international standards established by peer lending institutions. According to Steve Herz with Bank Information Center, “In its Safeguard Policy Update process, ADB has stated its intent to harmonize its safeguard policies with those other multilateral development banks. In particular, it has suggested that IFC’s Policy and Performance Standards would be a key benchmark for that harmonization. However ADB’s draft Safeguard Policies fall substantially short of IFC requirements in a number of substantive areas, including:

- Environmental and Social Assessment;
- Biodiversity and Sustainable Natural resource Management;
- Pollution Prevention and Abatement;
- Greenhouse Gas Emissions;
- Community Health and Safety;
- Labor and Working Conditions;
- Community Consent;
- Extractive Industries Projects;
- Delivery of Essential Services;
- Involuntary Resettlement;
- and Indigenous Peoples.

Giant loopholes: “Framework Approach” and “Multitranches Finance Facility”

The ADB’s proposed “Framework Approach” and “Multitranches Finance Facility” create giant new loopholes for avoiding rigorous application of environmental and social safeguards. The ADB proposes the using what it terms a “framework approach” to operations in the Asia-Pacific region as well as the use of a multitranches finance facility. These efforts would allow the ADB -- prior to the development of any environment,

⁵ See detailed reports by International Accountability Project <http://www.bicusa.org/en/Article.2851.aspx>

⁶ For a detailed comparison of IFC and ADB standards (clearly demonstrating the fact that the proposed ADB standards fall far short of even IFC standards), see report by S. Herz for Bank Information Center at <http://www.bicusa.org/en/Article.2851.aspx>

resettlement or Indigenous Peoples' plans -- to commit to financing an entire sector or multiple tranches of a large project at a "national level," with potential significant moral hazard implications. The only safeguard requirements would be those chosen for implementation over an entire sector or for multiple tranches of a large project which were "agreed upon by the ADB and the borrower."

The Draft SPS proposes (C.2(b) 54) the elimination of the requirement to use standard, public, clear safeguard delivery mechanisms. Instead, "different procedures" than those specified by ADB would be used "for delivery of [safeguard] principles." According to the draft SPS, "It is expected that frameworks could be agreed upstream with borrowers for sectors at sub-national and national levels, and then tailored to the specificities of individual projects." Implementation commitments would be developed, apparently by the borrower, *only during project implementation after the finance has already been approved. This represents a tremendous reduction in leverage by ADB and project-affected peoples over project outcome and impacts, given the massive disbursement of finance for an entire project or an entire sector at one time.* This would mean that there would be little oversight over multiple phases of a given large-scale project since each phase would no longer have to be approved for release of funds.

Concerns regarding Country Systems⁷

An assessment by the Center for International Environmental Law of the ADB's approach to "Country Safeguard Systems" – or the replacement of ADB standards and requirements by those of borrowing countries -- identified substantial flaws and concerns with this approach, including the ADB's omission of crucial requirements from the safeguard principles, problems in determining "equivalence" of country systems with ADB requirements, experience with World Bank country systems pilot projects which show a reduction in environmental and social standards, and increased difficulty for impacted communities to use accountability mechanisms. Substantial concerns have also been articulated by the Forest Peoples Programme in the analysis of impacts of country systems on Indigenous Peoples. South Asian and Indonesian groups have also expressed similar concerns.

Failure to integrate gender concerns as required by ADB policy

According to an analysis by Gender Action⁸, "the ADB gender policy and good practice require that all ADB operations address gender issues. Yet the Consultation Draft of the ADB's Safeguard Policy Statement (SPS) almost entirely fails to integrate gender concerns including safeguard elements of the ADB gender policy. The ADB's Bank Policy on Gender & Development in ADB Operations requires, "addressing gender considerations in ADB's macroeconomic, sector, strategy, and programming work, including studies on the impact of economic reform programs on women; undertaking gender analysis in projects; and ensuring the consideration of gender issues at all stages of the project cycle, including identification, preparation, appraisal, implementation, operation and maintenance, and monitoring and evaluation." The ADB Operational Procedures on Gender and Development establish procedures that ADB project staff must follow to integrate gender. Staff must assess potential gender issues in the initial project impact assessment required for all ADB operations. If the project "has the potential to correct gender disparities or significantly mainstream gender concerns, or is likely to have substantial gender impact," it is classified as Gender and Development (GAD) and an ADB gender or social development specialist must undertake a detailed gender assessment and prepare a project specific Gender Action Plan (GAP) during project design. The SPS fails to integrate safeguard elements in the ADB's own gender policy described above. The SPS does not sufficiently facilitate women's participation in ADB operations, and it neglects to provide adequate protections to ensure that ADB projects and programs do not contribute to gender inequality and the marginalization of women. The SPS does not mention any gender issues in the policy on Environmental Safeguards, despite many women's key role as custodians of the environment and many poor women's reliance on natural resources to provide household goods such as water and firewood. None of the SPS Safeguards require borrowers/clients meaningfully consult with men *and*

⁷ See report by Center for International Environmental Law at <http://www.bicusa.org/en/Article.2851.aspx>

⁸ This section consists of a citation from Suzanna Dennis, "Failing to Safeguard Gender Equality: Comments on the ADB Consultation Draft of Safeguard Policy Statement", Gender Action, December 2007

women, take gender issues into consideration during project assessment, address gender concerns identified in project design and implementation, or monitor projects for gendered results.

Missing information: budget necessary for safeguard implementation, Operations Manuals. One of the key things that will determine the extent to which it will be possible for the ADB to implement any safeguards, including existing measures, is the budget proposed for safeguards. This section is entirely missing – no data are provided on proposed costs and budgetary support for safeguard implementation. The safeguard implementation budget must be provided prior to any meaningful public consultation process. The same is true of the Operations Manuals that are cited in the SPS text which provide implementation information. They have not been made public.

South Asia Groups Call for Boycott of January South Asia Consultation

Citing the ADB's "deeply flawed draft 'safeguard policy statement' and underscoring the fact that the ADB's draft safeguard policy "undermines its own existing policy" with a "new draft which collapses all three policies into one 'statement' of principles", South Asian groups including the Indian Social Action Forum, Ghati Morcha, National Hawkers Federation, National Forum of Forest People and Forest Workers, Urban Research Centre, and River Basin Friends have recently launched a call for a boycott of the planned mid-January SPS consultation. The groups critique the Bank's "much touted country systems approach" which has "shamelessly evolve[d] out of "requirements for Borrowers/Clients" where "member country governments clamour for 'investments at all cost', thus betraying the affected communities and ignoring the rising tide of peoples movements demanding their governments to be more transparent and accountable." The South Asian groups express concerns about the proposed framework approach which "is turning back the clock in development lending by taking environmental and social mitigation measures out of project design to appease its member country government and facilitate private sector participation." The groups cite "fraudulent EIAs and environmental clearances, suppression of information, gross violation of human and indigenous rights in Lafarge mining (Meghalaya, India), Phulbari (Bangladesh), STDP in Sri Lanka, West Seti in Nepal."

Conclusion: We have engaged in the SPU process to date on a good faith basis, taking at face value the commitment by ADB management that the new Safeguard Policy Statement would not entail the weakening of ADB safeguards. Unfortunately, the draft SPS presented for public comment actively promotes a substantial weakening of most of the ADB safeguard protections. **This draft, as currently written, is unacceptable and is not suitable as a basis for public consultation. We urge the ADB to withdraw this draft and re-write it, prior to continued public consultation to comply with existing ADB environmental and social protection measures and international best practices.** We urge the ADB to address the aforementioned failures as well as the issues raised in the more detailed analyses presented by the authors of these summaries and other members of the NGO Forum on the ADB.

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| <p style="text-align: center;">Summary of the Asian Development Bank's Safeguard Policy Statement Weaknesses and Omissions fail to protect the rights of indigenous peoples</p> |
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January 2008

Overview of policy weaknesses

The draft policy statement currently fails to meet existing standards on safeguard measures for indigenous peoples on a number of key, significant points. Further consideration of the detail of these areas in which revision and improvement is required can be provided on request, in summary the draft policy:

- fails to apply or reference relevant international agreements, legal norms and laws as relevant to the requirements of the policy, in particular the UN Declaration on the Rights of Indigenous Peoples
- fails to provide protections equivalent to the sub-standard previous protections of the 1998 Policy on Indigenous Peoples and therefore represents a weakening of already unacceptably low standards within the Bank
- fails to apply a human rights based approach to development
- fails to ensure that the policy provisions are universally applied across all Bank-supported activities (in particular 'Section E' or 'special requirements')
- fails to protect or recognize the right to free, prior and informed consent in ANY activity impacting on indigenous peoples
- fails to provide protection for customary and traditional tenure in projects involving physical relocation or direct impacts on indigenous peoples' lands, if such tenure is not formally recognized by the state
- fails to ensure that the imposition of Protected Areas can only proceed with the free, prior and informed consent of the affected peoples, in direct contravention of agreements made under the World Parks Congress (Durban 2004)
- fails to provide for the establishment of accessible, effective mechanisms for redress for projects and programmes impacting on indigenous peoples that would meet the international standard of self-determination (protected by the UN Declaration on the Rights of Indigenous Peoples)
- fails to ensure that indigenous peoples lead the process of development planning for projects and programmes impacting on them, again in contravention of the right to self-determination
- fails to prohibit the relocation of indigenous peoples from their traditional lands, territories and resources without their free, prior and informed consent, nor does it prohibit the restriction of access or commercial development of natural resources found on the lands of indigenous peoples
- fails to provide disclosure requirements sufficient to ensure informed decisions can be made, in particular SIA and EIA documents

In consultations with indigenous peoples held in Manila in November 2007, representatives of indigenous peoples provided strong recommendations that need to be met for this draft to be acceptable for indigenous peoples. These recommendations are primarily focused on the provisions in the 'policy provisions' and 'operational requirements' for indigenous peoples and should be read in conjunction with comments on the broader policy statement as prepared by other organizations and individuals.

Recommendation One: Free, Prior and Informed Consent MUST be enshrined in the safeguards for all lending modalities affecting indigenous peoples

1. Free, prior and informed consent is essential for the indigenous peoples' sections of the SPS, both in the policy principles and in the safeguard requirements. The point was made and reiterated that free, prior and informed consent is the standard to which Asian governments have held themselves with their support of the UN Declaration on the Rights of Indigenous Peoples, and that the ADB has held itself to the standard of consent in the past (1998 policy) and proposed it in the July draft of the new SPS. Part of the process of obtaining consent should reference consultation with national and local indigenous peoples' organizations, and involvement of representative indigenous institutions.

Recommendation Two: Inclusion of guidance and reference to international law, including the UN Declaration on the Rights of Indigenous Peoples

2. Specific reference within the SPS must be made of international law, recognizing that international law is both binding and/or advisory on all borrower governments and clients, and that the ADB should provide assistance to its borrowers in understanding what legal guidance is available to them. Specific legal instruments referred to in the consultation included the UN Declaration on the Rights of Indigenous Peoples, ILO Convention 169 and 'consistent with international and national laws and legal norms'.

Recommendation Three: The safeguards must detail the establishment of accessible, effective and responsive grievance mechanisms

3. There must be a requirement to include a grievance mechanism at the project level as an essential part of the IPP, with representation from indigenous peoples on the grievance committee and/or panel. For some projects a national level committee may additionally be appropriate, and flexibility should be retained to enable the most suitable grievance mechanism for any particular project to be designed and included in the IPP. In addition to project, and possible national level mechanisms, there should be an ADB-wide panel for addressing indigenous peoples' grievances, when not addressed at a project or national level. This body could have regular sessions throughout the year, and review specific complaints and reporting directly to the Board. This panel could address, among other things, redress for past unresolved complaints, and focus on mediation of agreed and viable solutions to on-going impacts. All levels of grievance mechanisms (project / national / ADB) must have the required authority and mandate to enable them to effectively address the complaints raised (the independence and 'teeth' or authority).

Recommendation Four: Specific requirements for information disclosure should reference 'all relevant project documents' including environmental and social impact assessments

4. Information disclosure requirements are essential as a tool to enable indigenous peoples' organizations to monitor borrower/client compliance with the policy requirements. The text on information disclosure must include reference to all relevant project documents, including social and environmental assessments, indigenous peoples' plans and any other relevant management plans. Information dissemination should be done in a manner conducive to access by indigenous peoples, using suitable languages and formats.

Recommendation Five: An Indigenous Peoples' Plan should all be should be a mandatory requirement for all projects, programmes or other funding modalities impacting on indigenous peoples, should be developed primarily by indigenous peoples and should include reference to the applicable grievance mechanisms (see Recommendation 3 also).

5. An Indigenous Peoples' Plan should be a mandatory requirement for all projects and other activities triggering the indigenous peoples' safeguards. When other safeguard requirements are triggered also (ie. involuntary resettlement) then additional components may be added to the IPP to ensure compliance with other requirements. Where indigenous peoples are a minority section of the affected peoples, an IPP could form a component of a wider social safeguard plan. Indigenous peoples should guide and lead the formation of the IPP, facilitated by consultants as required. The IPP must reflect the agreed conditions for project implementation, and must be finally approved by the affected indigenous peoples through their representative institutions.

Recommendation Six: The use of country safeguard systems or the development of a framework approach to safeguard application under MFF, sector loans or other funding mechanisms is rejected as weakening and confusing the intent and effectiveness of the proposed safeguards.

6. Fundamental principles of safeguards – including but not restricted to the principles of free, prior and informed consent, respect for customary land rights, information disclosure and consultation – are universal. A safeguard system which establishes 'two tiers' of application weakens, confuses and ultimately loses its ability to protect the values it has been created to protect. We refuse the 'equivalency judgement' that the ADB proposes for use of country systems without full involvement of potentially affected peoples, both indigenous peoples and any other project-affected peoples, and see no practical way to implement such a collaborative judgment.

Summary:
Weaknesses in Environment Safeguards of the SPS Consultation Draft

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Environmental Defense Fund finds the Consultation Draft of the Safeguard Policy Statement, including the components related to environmental assessment, to be unacceptable and unsuitable as a basis for public consultation for the following reasons:

1. **Dramatic weakening of existing ADB standards.** Despite the ADB's publicly announced guarantee that the new Safeguard Policy Statement (SPS) would not lead to the weakening or elimination of social and environmental protections currently provided under existing ADB safeguard policies, the October 2007 SPS Consultation Draft represents a dramatic weakening of the majority of existing ADB safeguard policies. Essentially, this draft SPS **eviscerates the ADB's detailed and currently mandatory environmental safeguards and replaces them with one page of mandatory vaguely worded "policy principles,"** much weaker than existing requirements and subject to wide interpretation. The October "Consultation Draft" represents an even further weakening of the July 2007 draft SPS which was also, for the most part, weaker than existing standards. Environmental standards and implementation requirements ("delivery mechanisms") have been weakened in all sectors of ADB operations, including project loans, program loans, sector loans, corporate investments, financial intermediaries, and co-financing. The current requirement that Environmental Assessments be carried out for "all project components whether financed by ADB, co-financiers, or the borrower" has been eliminated as has been the existing requirement for the assessment of "indirect and cumulative impacts." There has also been a direct weakening of:

- the ADB's role and responsibilities, borrower obligations
- public consultation and participation requirements
- information disclosure requirements
- monitoring, reporting, due diligence, and review requirements
- definition of "external experts" (to avoid conflict of interest problems), "project area of influence"
- requirements pertaining to changes in project scope, "uncertainties in location", etc.

These direct violations of the ADB's guarantee that the new SPS process will not lead to any weakening of standards renders the current draft unacceptable and unsuitable as a basis for public comment.

2. Elimination of mandatory implementation requirements?

The detailed pages of ADB policy implementation measures which are currently mandatory have been replaced with "General Requirements" for all safeguards (Environment, Involuntary Resettlement, Indigenous Peoples) which are far weaker, for the most part, and much more vague than existing safeguard implementation requirements. In the October 2007 SPS draft, these new "delivery mechanisms" for ADB safeguard policies are described in 46 pages of detailed requirements for ensuring implementation and compliance. However, due to careful language changes made in the Draft SPS, these requirements appear to be *no longer mandatory or are now so vaguely written as to be unenforceable.*

Senior ADB officials who are deeply concerned about the direction of the SPS process have indicated to us that "effectively nothing is mandatory because there is so much flexibility in what is done." According to these officials, the SPS dramatically compromises the ADB's ability to ensure compliance "because the entire thing is unclear, filled with vague language, with a lack of clear statements about exactly what is required and how requirements will be operationalized." The lack of clearly mandatory, enforceable safeguard implementation measures ("delivery mechanisms")

represents a complete reversal of ADB's core safeguard requirements, and is a potentially devastating blow to the environment and project-affected communities.⁹

3. Many of the protections provided in the current draft are, in addition to being significantly weaker than existing ADB **standards, far below international standards established by peer lending institutions**. For example, the October SPS draft aims (Section A. 37) to “avoid negative impacts of a project on the environment and people affected where feasible.” ...“(ii) where avoidance is not feasible, minimize, mitigate, etc.” This represents a weakening of the July 07 Draft SPS which stated (Section A 36) that the goal was to “avoid.. impacts..where possible.” For example, both drafts are far weaker than IFC standards which state: “*Central to IFC’s development mission are its efforts to carry out its investment operations and advisory services in a manner that “do no harm” to people or the environment. Negative impacts should be avoided where possible, and if these impacts are unavoidable, they should be reduced, mitigated or compensated for appropriately. In particular, IFC is committed to ensuring that the costs of economic development do not fall disproportionately on those who are poor or vulnerable, that the environment is not degraded in the process, and that natural resources are managed efficiently and sustainably.*” (para 8). *IFC Policy & Performance Standards*¹⁰

3. Strong language pertaining to compliance has been replaced with language assuring borrowers that failure to comply with requirements will not necessarily result in penalty. For example, the July 07 Draft SPS stated “If compliance with the safeguard policies still is not met after these remedies, ADB will suspend financing until noncompliance is rectified or cancel the project.” This language has been removed and replaced with language assuring borrowers that “Resorting to legal remedies in the event of noncompliance is not automatic or mandatory when a borrower fails to comply.”

4. There is no detailed language in the environment safeguard policy regarding the rights of project-affected peoples who are not Indigenous Peoples and who do not meet the newly weakened and restrictive definition of “involuntary resettlement.”¹¹ There is no commitment to respecting and safeguarding the human rights, livelihoods, habitats, and practices of project-affected peoples, other than Indigenous Peoples. (Please note that the IP language is still considered quite problematic.) This leaves non-Indigenous project-affected extremely vulnerable. There are no clear, detailed requirements for the manner in which assessments of social impacts of environmentally sensitive projects will be carried out nor requirements for full participation in decision-making by affected peoples.¹²

5. The existing 120 day public comment period has been eliminated. *The draft SPS proposes no minimum specified period of public comment at all.* Policy principles make no detailed requirements for the timing of consultations with project-affected peoples. There are no clear requirements in the policy principles for the timing of the release of documents to the public.

⁹For details, see S. Fried, “Elimination of Mandatory Implementation Requirements for Safeguards?”, January 2008

¹⁰ Thanks to Steve Herz for providing his analysis of IFC Policy and performance standards. For more details see S. Herz, *Comparison between ADB SPU and IFC Policy and Performance Standards*

¹¹ See Joanna Levitt, *Summary: Weaknesses in Involuntary Resettlement Components of Involuntary Resettlement SPS Consultation Draft*, January 2008

¹² For Indigenous Peoples, this Draft states that a plan must be developed based on a “social assessment” done by “qualified professionals”, drawing on indigenous knowledge and “the participation of affected communities.” “Screen early to determine (a) whether IPs are present, or have collective attachment to, the project area and (b) whether there are likely project impacts on IPs.” The Social Assessment must “give full consideration to options preferred by the affected Indigenous Peoples in the provision of project benefits and in the designing of mitigation measures” and measures must be developed to “avoid, minimize and/or mitigate adverse impacts on IPs.” “Free, prior and informed consultations” with “affected communities to solicit their participation in (a) designing, implementing, and monitoring measures to avoid adverse impacts, or, when avoidance is not feasible, to minimize, mitigate, or compensate for such effects”; “In deciding whether to proceed with the project, ascertain that the affected IP communities provide their broad support to the project, on the basis of free, prior, and informed consultation.” “Avoid, to the maximum extent possible, any restricted access to and relocation from protected areas and natural resources. ” “Adopt a participatory monitoring approach” There is no such language pertaining to project-affected peoples who are not Indigenous or involuntarily resettled under the newly restrictive definition of resettlement.

6. There are no clear requirements for the type of “grievance mechanism” available to project-affected communities.

7. There is **no requirement to obtain free, prior, informed consent from project affected peoples**. “Broad community support” and “good faith negotiations” are required for Indigenous Peoples but not for other project-affected local peoples.¹³

8. Application of Framework Approach and Multitranche Finance Facility: Creation of giant loopholes for avoiding rigorous application of environmental and social safeguards

The ADB proposes the using what it terms a “framework approach” to operations in the Asia-Pacific region as well as the use of a multitranche finance facility. These efforts would allow the ADB -- prior to the development of any environment, resettlement or Indigenous Peoples’ plans -- to commit to financing an entire sector or multiple tranches of a large project at a “national level,” with potential significant moral hazard implications. The only safeguard requirements would be those chosen for implementation over an entire sector or for multiple tranches of a large project which were “agreed upon by the ADB and the borrower.”

The Draft SPS proposes (C.2(b)54) the elimination of requirement to use standard, public, clear safeguard delivery mechanisms. Instead, “different procedures” than those specified by ADB would be used “for delivery of [safeguard] principles.” According to the draft SPS, “It is expected that frameworks could be agreed upstream with borrowers for sectors at sub-national and national levels, and then tailored to the specificities of individual projects.” Implementation commitments would be developed, apparently by the borrower, during project implementation after the finance has already been approved. **This represents a tremendous reduction in leverage by ADB and project-affected peoples over project outcome and impacts, given the massive disbursement of finance for an entire project or an entire sector at one time.** This would mean that the Board of Directors would have no oversight over various phases of a given large-scale project since each phase would no longer come before the Board for a vote or public comment.

This giant loophole, which was first circulated in the July 07 SPS draft was further enlarged in the October 2007 draft. The July draft stated that Framework Approach was “**not appropriate for complex and sensitive projects, with the exception of specific non-sensitive components of such projects.**” (This is a highly problematic formulation which could allow, for example, the ADB to fund under a vague “framework approach” a so-called “non-sensitive” component of, for example, a tremendously damaging mining project.) The October SPS draft further weakens the language by allowing a Framework approval approach for projects other than “**highly complex and sensitive projects, with the exception of specific non-sensitive components of such projects.**”

Thus, the October SPS draft seems to indicate that the Framework Approach – to pre-approve an entire sector of projects, potentially at a national level, could indeed be used for “complex and sensitive projects” as long as they are not “*highly complex and sensitive.*”

9. Lack of information on funds necessary for Safeguard implementation. One of the key things that will determine the extent to which it will be possible for the ADB to implement any safeguards, including existing measures, is the budget proposed for safeguards. This section is entirely missing – there is no data on proposed costs. The safeguard implementation budget must be provided prior to any meaningful public consultation process. Instead, the October Consultation Draft has eliminated the following language found in the July version of the SPS: *“One of the major findings of the OED special evaluation studies on the environmental, involuntary resettlement, and indigenous peoples safeguards is there is a lack of adequate safeguard specialists in ADB, and this lack of capacity precludes effective implementation of the existing ADB safeguard policies.”*

¹³ See comments by H. Leake regarding the lack of clear guidance on “consultation”, “BCS” and “good faith negotiation” in IP policy.

Language from the July draft regarding the need to increase staffing for the planned new policies has been eliminated in the October draft. For example, the following was eliminated: *“Increase in overall staff time for implementing the new policy is expected, which is estimated due to the needs of strengthening supervision and monitoring during project implementation, CSS assessment, and up-front training of ADB staff and borrowers.”*

Conclusion: We have engaged in the SPU process to date on a good faith basis, taking at face value the commitment by ADB management that the new Safeguard Policy Statement would not entail the weakening of ADB safeguards. Unfortunately, the draft SPS presented for public comment actively promotes a substantial weakening of most of the ADB safeguard protections. **This draft, as currently written, is unacceptable and is not suitable as a basis for public consultation. We urge the ADB to withdraw this draft and re-write it, prior to continued public consultation to comply with existing ADB environmental and social protection measures and international best practices.** We urge the ADB to address the aforementioned failures as well as the issues raised in the more detailed analyses presented by members of the NGO Forum on the ADB regarding environmental protection, Indigenous Peoples, and Involuntary Resettlement.

Summary:
Weaknesses in Involuntary Resettlement Components of the SPS Consultation Draft

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The International Accountability Project (IAP) finds the Consultation Draft of the Safeguard Policy Statement, including the components related to involuntary resettlement, to be unacceptable for the following reasons:

1. Despite the ADB's publicly announced guarantee that the new Safeguard Policy Statement (SPS) would not lead to the weakening or elimination of social and environmental protections currently provided under existing ADB safeguard policies, **the draft SPS presented for public comment represents a dramatic weakening of the majority of existing ADB safeguard policies.** In addition to being lower than ADB's existing standards, protections provided in the current draft are also weaker than those included in *earlier drafts* of the SPS. This direct violation of the ADB's guarantee that the new SPS process will not lead to any weakening of standards renders the current draft unacceptable and unsuitable as a basis for public comment.
2. In addition to being significantly weaker than existing ADB standards, protections provided in the current draft are **far below international standards established by peer lending institutions and other international agencies.**¹⁴

Such regression suggests a lack of good faith on the part of ADB management, and constitutes a failure to ensure that projects are designed to ensure poverty alleviation and are based on democratic decision-making processes, respect for human rights and a commitment to ensure not only a lack of harm but, indeed a benefit, to those displaced by ADB projects.

The ADB's policy on resettlement is critically important to millions of people across Asia. It is well established that involuntary resettlement leads to impoverishment of affected people unless comprehensive measures are taken to ensure otherwise. The proposed involuntary resettlement provisions of the draft SPS endanger displaced people with much greater risks of life-threatening impoverishment. **The ADB, as a public institution with a mandate to promote poverty alleviation, must ensure that its lending activities do not result in 'involuntary impoverishment' of the vulnerable populations that its projects displace.** It is thus essential that the ADB establish robust safeguard policies that effectively prevent impoverishment. In this regard, the current draft SPS, as well as the process by which it was haphazardly assembled, are woefully inadequate. Given the fundamental flaws in substance and process of the SPS, we reject the proposed SPS in its entirety and call for a comprehensive overhaul of the document and revision process.

¹⁴ In these comments, best practice and international standards for involuntary resettlement are drawn primarily from the following sources:

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

Among the many substantive flaws that will endanger the rights and wellbeing of people displaced by ADB-financed projects, the following four shortcomings are particularly salient:

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

- **Narrows the definition of who is considered “displaced” and therefore in need of necessary safeguard protections.** The draft strikes from the previous policy critical groups of affected people who are displaced by “*changes in land use*” and “*restricted access to natural resources*,” and replaces these widely-accepted definitions with a narrower category of people who suffer from “*involuntary restriction on land use*” and “*involuntary restriction of access to legally designated parks and protected areas*.” As a result, many displaced people who will lose access to lands, resources and livelihood sources due to project-related impacts will be excluded from ADB protection. This limited scope falls far below international best practice on involuntary resettlement, which provides that any persons who are physically or economically displaced by project-related activities and impacts should be covered under involuntary resettlement safeguard entitlements (see, for example, World Commission on Dams final report, p. 103).
- **Excludes all people displaced by the wide range of project-related activities beyond direct land acquisition.** The draft resettlement policy shifts responsibility for a wide array of involuntary resettlement impacts to be covered by the Environmental components of the SPS (e.g. “[A]dverse economic, social or environmental impacts from project activities other than land acquisition” will be covered “*through the environmental assessment process*.”) Such shifting is inappropriate and irresponsible. As a general matter, environmental policies are not designed to protect against the unique risks associated with involuntary resettlement. In the case of the specific Environmental components of the draft SPS, there is no mention of the social procedures and protections needed to ensure that affected people’s rights and livelihoods are upheld and improved, respectively. This surprising new exclusion of entire categories of affected peoples from the resettlement policy, and the lack of appropriate coverage for such affected people under the environment policy, dramatically heightens the risk of institutional neglect of displaced people and hampers efforts to ensure ADB accountability.
- **Imposes the unneeded qualifier “involuntary” before key policy triggers** (e.g., “*involuntary acquisition of land*” and “*involuntary restriction of access*”) which enables governments to escape policy requirements, by declaring coercive land acquisition and other forms of resettlement as “voluntary,” and deprive displaced people of safeguard protections and entitlements. This dangerous semantic loophole has commonly been utilized by governments in countries such as Indonesia where official reports often claim that forest dwelling communities have “voluntarily” given up their forested lands for logging and plantation development, despite the fact that these lands were seized without permission.

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

- **Eliminates key provisions of the current ADB policy that outline detailed and explicit requirements for restoring access to common property resources** such as forests and grazing lands, public facilities and cultural sites. The new draft contains no meaningful mention of common property resources. Such regression is yet another major step backwards that is inconsistent with current international standards.

- **Ignores key emphasis that *compensation alone is not enough to improve, or even restore, livelihoods after displacement.*** Instead the new language inappropriately stresses compensation as a *primary* means of rehabilitation and livelihood improvement. The existing ADB policy, along with those of its peer institutions, explicitly recognizes that compensation should be just one part of a broader package of development assistance measures designed to genuinely rehabilitate affected people, and which factor in their development needs and priorities (see, e.g World Bank Policy on Involuntary Resettlement). Again, such exclusion demonstrates institutional regression that falls short of international best practice.
 - **Strikes key requirements for benefit-sharing mechanisms** that were included in the July 2007 version of the draft. As a fundamental component of international best practice for resettlement programs, benefit sharing must be a central pillar of any resettlement policy.
- 3. The SPS’s draft language on consultation, participation, and communities’ rights to free prior informed consent is inadequate and falls far short of standards upheld by the ADB’s peer institutions and even provisions set forth in previous SPS drafts. For example, the SPS:**
- **Fails to require free prior informed consent, broad community support (BCS) or encourage reaching agreements through negotiated settlements.** These concepts are basic pillars of contemporary best practice on development decision-making (see, e.g., IFC Policy on Social and Environmental Sustainability, World Commission on Dams Final Report). Failure to even mention them demonstrates the retrograde nature of the proposed policy. The Consultation Draft eliminates positive changes presented in the July 2007 version of the draft SPS which included explicit requirements for: meaningful participation; rights to free prior informed consultation and consent; reaching agreement through negotiated settlements; and equitable benefit-sharing schemes.
- 4. The draft SPS lacks clear, objective and measurable criteria that define the nature of project impacts and the corresponding mitigation measures required to protect displaced people. Without such essential criteria, it will be impossible to ensure accountability and that the client/borrower and ADB comply with policy requirements. Specifically, the draft SPS:**
- **Removes clear language on project categorization for projects causing involuntary resettlement, and replaces these with muddled provisions** that will confuse affected people as well as ADB managers and project implementers. (e.g. “*Resettlement plans will be prepared commensurate with the extent and scale of the impacts*”; and “*If these impacts are found significantly adverse at any stage of the project, the borrower/client will consider applying the policy principles and safeguard requirements on involuntary resettlement...*”) Rather than offering clarity, such language poses questions about exactly how “extent and scale” of impacts will be determined, who shall make such decisions, in what sequence these assessments will be made during project development , and exactly what impacts must be addressed by specific mitigation measures.
 - **Lacks explicit and measurable criteria that will enable effective project oversight and evaluation and ensure institutional accountability.** More specifically, the draft SPS fails to protect against cases in which implementing agencies may have a conflict of interest against declaring a project’s impacts “significant,” or otherwise upholding the policy objectives and principles.

Conclusion: The ADB must re-write the SPS to address the aforementioned failures, including ensuring that – as per ADB public statements regarding the SPS process – there will be no weakening of existing ADB policies.

Comparison between ADB SPU and IFC Policy and Performance Standards

By Steve Herz for Bank Information Center

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In its Safeguard Policy Update process, ADB has stated its intent to harmonize its safeguard policies with those of other multilateral development banks. In particular, it has suggested that IFC's Policy and Performance Standards would be a key benchmark for that harmonization. However ADB's draft Safeguard Policies fall substantially short of IFC requirements in a number of substantive areas, including:

- *Environmental and Social Assessment; Biodiversity and Sustainable Natural resource Management;*
- *Pollution Prevention and Abatement; Greenhouse Gas Emissions; Community Health and Safety;*
- *Labor and Working Conditions; Community Consent; Extractive Industries Projects;*
- *Delivery of Essential Services; Involuntary Resettlement; and Indigenous Peoples.*

Each of these are addressed below.

1. Social assessments: IFC Performance Standard 1 (Social and Environmental Assessment and Management Systems) establishes the importance of an integrated assessment to identify the social and environmental impacts, risks, and opportunities of projects. It is clear and unambiguous that the full range social impacts must be assessed, particularly those that are addressed in other performance standards. (labor and working conditions, indigenous peoples, community health, involuntary resettlement) (para. 4).

ADB's draft Safeguard Policy Statement and Environmental Assessment provisions, on the other hand, are less clear. They generally refer only to *environmental* impacts and assessments. (see e.g., para 42).

2. Projects with Significant Adverse Impacts: PS 1 requires that "projects with potential significant adverse impacts that are diverse, irreversible, or unprecedented will have comprehensive social and environmental impact assessments. This assessment will include an examination of technically and financially feasible alternatives to the source of such impacts, and documentation of the rationale for selecting the particular course of action proposed." This language is not evident in the draft ADB policy. Indeed, it is not clear that borrowers/clients have any heightened assessment responsibilities for higher impact projects.

3. Assessment of Differential Impacts: PS 1 requires clients to "identify individuals and groups that may be differentially or disproportionately affected by the project because of their disadvantaged or vulnerable status. Where groups are identified as disadvantaged or vulnerable, the client will propose and implement differentiated measures so that adverse impacts do not fall disproportionately on them and they are not disadvantaged in sharing development benefits and opportunities." (para 12). The ADB draft has no such requirements. This provision is critical to ensuring that ADB projects actually help alleviate poverty and deliver benefits to the poorest and most politically marginalized.

4. Reporting on Environmental Management Plans: PS 1 requires borrowers to disclose EMPs to the affected communities. (para 26). ADB's draft policy implies, but does not specify, that EMPs and draft EMPs will be disclosed as part of the consultation process, (para 13), but these documents are not included in the list of documents that must be disclosed in the draft EA policy (para 14), or in the information disclosure section of the Safeguard Policy Statement (para 45). This should be clarified.

5. Biodiversity and Sustainable Natural Resource Management:

a. Critical Natural Habitats: ADB draft policy adopts IFC's definition of "critical natural habitats", the areas that are afforded the highest level of protection in the policy. (ADB para 18, fnnt 3; IFC PS 6, para 9). However,

whereas ADB's policy tolerates greater adverse impacts on these habitats than IFC's PS does. ADB's draft policy precludes project activity that causes "significant conversion or degradation of critical habitat" while IFC's Performance Standards explicitly abandoned the "significant conversion or degradation" standard in favor of a more protective "measurable impact" standard.

b. Mitigation: IFC's PS 6 establishes that an explicit objective of mitigation measures is to "achieve no net loss of biodiversity..." (para 8). This objective is not evident in the ADB draft.

c. Management of Forests and Aquatic Ecosystems: IFC's PS 6 includes requirements for the sustainable management of natural and plantation forests (para 16) and freshwater and marine ecosystems (para 17) that are omitted in ADB's draft policy.

6. Pollution Prevention and Abatement:

a. Avoidance of Pollutants: IFC's PS3 provides that the emission of pollutants should be avoided, and when avoidance is not feasible, minimized or controlled (para 4). The ADB draft policy appears to drop this preference for avoidance (para 26), though it retains a similar preference for avoidance with respect to the generation of wastes.(para 25).

b. Resource Conservation and Energy Efficiency: IFC's PS 3 provides that the "client should examine and incorporate in its operations resource conservation and energy efficiency measures, consistent with the principles of cleaner production." (para 4). No such requirement is evident in the ADB draft.

c. Hazardous Materials: PS 3 requires the borrower to "avoid the manufacture, trade, and use of chemicals and hazardous materials subject to international bans or phase-outs due to their high toxicity to living organisms, environmental persistence, potential for bioaccumulation, or potential for depletion of the ozone layer, and consider the use of less hazardous substitutes for such chemicals and materials." (para 6). No such requirement is included in the ADB draft.

d. Pesticide Use and Management: Like PS 3, the draft ADB policy expresses a preference for integrated approaches to pest management. However, PS 3 is much clearer that chemical management should only be used as a last resort. And when pesticides are to be used, PS 3 has far more stringent requirements regarding which pesticides may be used and under what circumstances. (para 13).

7. Greenhouse Gas Emissions: The ADB draft waters down the already meager requirements of PS 3 with respect to greenhouse gas emissions. Whereas PS 3 requires all clients to reduce "project-related greenhouse gas (GHG) emissions in a manner appropriate to the nature and scale of project operations and impacts (para 10)," the ADB draft policy may only apply to projects that are expected to produce significant quantities of greenhouse gases. (para 27). Moreover, whereas IFC requires reductions in emissions, the draft ADB policy requires borrowers only to evaluate options, and treats emissions reductions and offsets as interchangeable options.

8. Community Health, Safety and Security: The ADB draft policy does not have a section that addresses the issues covered by IFC's PS 4.

9. Labor and Working Conditions: The ADB draft policy does not have a section that addresses the issues covered by IFC's PS 2.

10. Broad Community Support: The draft Policy Statement uses IFC's definition of broad community support. However, whereas IFC's Policy says that IFC will ensure that broad community support is achieved in all consultative engagement processes, ADB requires it only where communities of Indigenous Peoples are affected. (para 47). ADB therefore does not require that consultations reach any particular outcome.

11. Extractive Industry Projects: Unlike IFC, ADB's draft policy does not require additional assessments of governance issues, or that payments to governments and the terms of key agreements such as host government agreements, be publicly reported.

12. Delivery of Essential Services: For projects involving the final delivery of essential services, such as the retail distribution of water, electricity, piped gas, and telecommunications, to the general public under monopoly conditions, IFC encourages the public disclosure of information relating to household tariffs and tariff adjustment mechanisms, service standards, investment obligations, and the form and extent of any ongoing government support. If IFC is financing the privatization of such distribution services, IFC also encourages the public disclosure of concession fees or privatization proceeds. Such disclosures may be made by the responsible government entity (such as the relevant regulatory authority) or by the client. (para 23). ADB's Policy includes no such provisions.

13. Involuntary resettlement:

a. Definition of involuntary resettlement: IFC's definition of involuntary resettlement in PS 5 includes "negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail." (para 1). ADB, on the other hand, does not make clear that negotiated settlements in such coercive circumstances trigger the policy. (para 4).

b. Preference for avoidance: IFC's PS 5 expresses a preference for avoidance of involuntary resettlement, and treats mitigation as an option only where avoidance is not possible. (para 2). ADB's draft policy does not express such a preference.

c. Improving livelihoods: One objective of PS5 is "to improve or at least restore the livelihoods and standards of living of displaced persons." The ADB draft includes this objective in its discussion of Resettlement Plans, (para 13). but it should be made explicit up front.

d. Land for Land: PS 5 provides that "where livelihoods of displaced persons are land-based, or where land is collectively owned, the client will offer landbased compensation, where feasible." (para 8). Displacees must be given resettlement options, including adequate replacement property of equal or higher value and cash compensation. (para 16, 17). Under ADB's draft policy, only "business owners with legal rights or recognized or recognizable claims to land where commercial activities are carried out" are entitled to a preference for land-based compensation. (para 7).

e. Differential Impacts: PS5 requires that borrowers "provide relocation assistance suited to the needs of each group of displaced persons, with particular attention paid to the needs of the poor and the vulnerable." ADB's draft has no analogous provisions.

f. Affected persons without land rights: PS5 requires that displaced persons who have "no recognizable legal right or claim to the land they occupy" be given "a choice of options for adequate housing with security of tenure so that they can resettle legally without having to face the risk of forced eviction." (para 18). The ADB draft requires that they be given adequate housing with security of tenure, but not that they be afforded a choice of options. (para 6). PS 5 also provides for in-kind compensation to these oustees (para 18), whereas ADB's draft does not.

14. Indigenous Peoples:

a. Role of Representative Bodies: IFC's PS7 makes clear that Indigenous Peoples' representative bodies must be involved in the process of obtaining broad community support, and that ample time must be given for these collective decision-making processes to work. (para 9). These requirements are not evident in ADB's draft policy.

b. Non-titled lands: IFC's PS 7 ensures that "the client will offer affected communities of Indigenous Peoples at least compensation and due process available to those with full legal title to land in the case of commercial development of their land..." (para 13). ADB's draft does not similarly ensure parity with titled landholders.

An Evaluation of the ADB's Approach to "Country Safeguard Systems"
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The ADB's proposed approach to using "country safeguard systems" (CSS) to address the environmental and social impacts of ADB projects raises significant concerns. This approach, which endorses use of a country's legal and institutional framework rather than the full suite of existing ADB environmental and social safeguard policies and procedures and ADB institutional units, will, for the reasons described below, significantly weaken environmental and social standards and accountability at the ADB.

Too Much, Too Soon

The ADB relies on the World Bank's experience with its country systems pilot projects as precedent for development of the ADB policy. However, for several reasons, this experience provides inadequate grounding for the ADB proposal. First, the World Bank admits that it is too soon to draw any conclusions from its pilot projects, noting that "most of the data obtained from the pilots reflect the experience of project preparation rather than project implementation." Additionally, the Bank has taken a "project-by-project" approach to the pilot process to date, whereas the ADB is bypassing this project-level approach for a country-level approach. Moving forward with the ADB proposal without a complete and thorough evaluation of impacts would be inconsistent with the ADB management's endorsement of a "cautious and phased approach" to the application of a country systems approach for ADB projects.

Long-term Strengthening of a Country's Laws and Institutions Will Rarely (If Ever) Be Achieved

Proponents of the country systems approach argue that the costs and risks (including the significant risk that safeguard standards will be reduced, see below) of such an approach are worth it for the benefit – stronger safeguards for all projects, not just those of the banks pursuing this approach. A stronger country system is a laudable goal, but, for the following and other reasons, the approach being pursued by the ADB, like the approach being pursued by the World Bank, will rarely, if ever, achieve this goal.

Despite suggestions to the contrary by the World Bank, virtually no permanent, legally-binding improvements in country systems are being achieved in the pilot projects. Measures to address identified gaps largely include short-term fixes, such as non-permanent guidelines, that are mandatory only in the context of a given project as loan agreement requirements. Moreover, specific timeframes for implementation of these measures as well as processes for transparent monitoring and evaluation of the effectiveness of these measures do not exist.

Moreover, the approach fails to acknowledge that, in facing pressures from powerful clients, banks will often back down from requiring and enforcing strong standards. In a recent analysis of Action Plans developed by World Bank management and approved by the World Bank Board in the context of efforts to address issues raised by Inspection Panel claims, it was determined that significantly less than half of the Panel's findings of non-compliance with policies were addressed in Action Plans prepared for projects in India and China. Moreover, implementation of Action Plans was inadequate (raising "acceptability" concerns). Will a country systems approach simply provide these

powerful countries easier and less noticeable opportunities to continue doing what they want to do, regardless of ADB standards?

Standards Will Be Reduced

Our analyses of the World Bank's pilot projects highlight that use of a CSS approach to lending can (and in the World Bank's pilot projects does) reduce environmental and social standards on paper - and in practice - in the following ways: (1) when the "principle" used to implement the CS approach requires less than the original environmental or social standard (in our analysis of the ADB CSS proposal, we found several examples of the "principle" requiring less than the policy – see <http://www.bicusa.org/en/Article.2851.aspx>); (2) when the principle provides for flexibility in how it is satisfied and the country's laws, policies, or procedures – or measures to fill gaps in these laws, policies, or procedures – are weaker than the original standards; and (3) when the "principle" and the original standard appear to be very similar, but the country's laws, policies and procedures embraced by the bank are not truly "equivalent" to the standard, or when agreed measures proposed for filling "gaps" inadequate. Finally, the standards can be reduced when the timeframe for implementation of gap-filling measures is inadequate.

Communities Will Face Increased Challenges in Preventing and Reducing Adverse Impacts of Projects

Communities can have a more difficult time preventing and reducing the adverse impacts of projects when using accountability mechanism processes is difficult. Use of the CSS approach can make it more difficult for communities to use accountability mechanisms because the approach can make it more difficult for communities to know when a policy is being violated.

Although the principles provide the general standards applicable to a project, a host country's laws, policies, and procedures flesh out and give greater definition to these general standards. When gaps in the countries laws, policies and procedures exist, the gap-filling measures are designed to provide this further definition.

Assessing and understanding the country's laws, policies, and procedures and any gap-filling measures – as well as knowing when they are to be applied – will be very difficult. The ADB's proposal fails to specify the level of detail that will be provided in Action Plans. Significantly, the proposal fails to identify when measures to fill gaps must be implemented. Additionally, it does not mention specifically that measures must be systemic, permanent and mandatory. This should be made explicit, given the deficiencies in gap-filling measures in the WB pilot process.

Simply put, the principles of the ADB policies do not provide the 'full picture' to communities of the standards applicable to a project. A community can file a claim for an apparent violation of a principle, but in the absence of clear information about what the ADB has embraced in satisfaction of that principle – either the existing laws, policies and procedures of the country or the gap-filling measures – it will be difficult for a community to know if a given activity is acceptable or not. In the absence of this knowledge, a community could be wasting its time, energy, and resources in pursuing a complaint; it cannot assess the likelihood of success with such a claim until after it knows how the ADB interprets the principle. Alternatively, in the absence of this knowledge, a community could be dissuaded from filing a complaint.

The ADB simply should not move forward with a country systems approach until (1) a thorough and independent evaluation of the World Bank pilot projects has been completed; and (2) strong evidence is provided that any country systems approach adopted will secure long-term strengthening of a country's laws and institutions that will not result in any weakening of social and environmental standards.

Elimination of Mandatory Implementation Requirements for Safeguards?
Stephanie Fried, Ph.D.
Environmental Defense Fund – January 2008

Through a series of careful language changes, ADB management has drafted the Safeguard Policy Statement in a manner which appears to eliminate (either directly or through the introduction of vague language rendering implementation measures largely unenforceable) the current detailed mandatory ADB requirements for the implementation of the safeguard policies. This stunning reversal of ADB policy poses a direct threat to project affected communities and the environment.

The July 2007 Draft SPS included descriptive language which provided clear insight into the fact that ADB Management intended only the one-page “safeguard policies” to be mandatory. Detailed implementation requirements are no longer unambiguously mandatory and enforceable. “Alternative” implementation measures would be apparently be allowed under the new system. The sole requirement is that they are “consistent” with the vaguely worded one-page safeguard policies. “Guidance” for the safeguards is to be provided in “operational manuals” which have not been made public.

*July 2007: C. 40. Policy Delivery Process: ADB follows a policy delivery process to ensure that the objectives of the safeguard policies are met and their policy principles are applied for the projects it finances. This process covers ADB’s three safeguard policies. It is articulated along the following main steps: screening and scoping; due diligence and review of safeguard assessment and plans; information disclosure and consultation; monitoring and reporting. **Further guidance for internal review procedures for each safeguard policy is provided in the relevant operational manuals. Alternatives to the general policy delivery process such as application of framework approach and use of country safeguard systems can be considered under specific conditions, provided that such alternative processes ensure that projects are developed, implemented and operated in a manner consistent with the intent and requirements of ADB’s safeguard policies.***

This descriptive language makes it very clear that the idea is to allow “alternatives to the general policy delivery process.” That is, the detailed, specific requirements (delivery mechanisms which make up the bulk of ADB policy) regarding the implementation of consultation, environmental assessment etc. may be replaced by other systems which are “consistent with the intent and requirements of the safeguard policies.” Please note that there is no mention of the safeguard delivery mechanisms. This plan therefore, appears to allow replacement of the current clearly mandatory detailed ADB safeguard mechanisms – designed to ensure proper implementation of protection measures – with vaguely worded language, subject to wide interpretation which is not clearly mandatory. The above plain language – which showcases the plan to eviscerate safeguard *requirements* - was removed in the October 2007 Draft version. However, other language changes were made elsewhere in the document to ensure the same result.

For example, in the introductory October 2007 Overarching Statement Section on the first page of the Safeguard Policy Statement (paragraph A.38) in the Policy Delivery Process General Requirements, language from the July 07 version was changed in a manner which eliminates the requirement for adherence to the ADB’s safeguard delivery mechanisms, in addition to policies and principles. The July 07 language read:

“ADB adheres to the objectives of the safeguard policies, their policy principles, **and delivery mechanisms**”.

The October 07 version changed this language to:

“ADB adheres to the objectives of the safeguard policies, their policy principles, **and their delivery.**”

Removing the phrase “delivery mechanisms” appears to remove the requirement for the ADB to adhere to the proposed 46 pages (eight pages of “General Requirements”, 38 pages of Attachments) of detailed delivery

mechanisms designed to ensure protection of the environment, Indigenous rights and involuntary resettlement requirements. The General Requirements – apparently no longer mandatory – include, for example, detailed methodology for Project Categorization (i.e. the placing of projects into Category A, B, etc.).

We note that senior officials within the ADB who are deeply concerned about the direction of the SPS process, have indicated to us that "effectively nothing is mandatory because there is so much flexibility in what is done." According to these officials, the SPS dramatically compromises the ADB's ability to ensure compliance "because the entire thing is unclear, filled with vague language, with a lack of clear statements about exactly what is required and how requirements will be operationalized." The lack of clearly mandatory, enforceable safeguard implementation measures ("delivery mechanisms") represents a complete reversal of ADB's core safeguard requirements, and is a potentially devastating blow to the environment and project-affected communities.