

APPENDIX:
SUMMARY OF CONCERNS AND RECOMMENDATIONS FOR EACH OF
THE SAFEGUARD POLICIES (Environmental Assessment, Involuntary Resettlement
and Indigenous Peoples)

<p style="text-align: center;">Summary of Concerns and Recommendations Regarding the Review of Asian Development Bank’s Environmental Safeguards</p>

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The summary comments below are based on a detailed review by Environmental Defense of ADB policies as well as those of other multilateral, bilateral and private sector financial institutions, and extensive reviews of ADB audits of projects as well as information from project-affected communities and NGOs throughout the Asia-Pacific region. We are concerned that an agenda of dismantling existing safeguard policies is being imposed despite data—including from the Bank’s own analyses—that indicate the need to strengthen the safeguard process and increase implementation and monitoring efforts. We urge the ADB to ensure that there is no weakening of any of the safeguard policies and that they are, in fact, strengthened with sufficient funding provided to ensure implementation in order to fully protect the environment and communities impacted by ADB projects.

Categorization

The ADB’s environmental categorization system differs from and is significantly weaker than that of the World Bank (WB) which requires projects with impacts that are “sensitive” to be classified as Category A and subject to an environmental assessment. The ADB allows sensitive projects to be classified as Category B (“B-sensitive”) and an EIA is not necessarily required for these projects. The World Bank defines “sensitive” projects as those which have impacts which “may be irreversible (e.g. lead to loss of a major natural habitat) or raise issues” relating to indigenous peoples, natural habitats, management of cultural property or involuntary resettlement. The World Bank requires environmental impacts of a Category A project to be compared to the impacts of alternatives, including a “without project” scenario and requires project proponents to recommend “any measures needed to prevent, minimize, mitigate, or compensate for adverse impacts and improve environmental performance.”¹

Recommendations: Require any project or subproject loans, program loans, sector loans, loans through financial intermediaries, changes in scope of loans, and private sector loans with impacts that are “sensitive” to be defined as Category A, subject to an EIA. Environmental assessments for Category A and B loans must be made available for the full 120 day public comment period, and the projects must be shown to meet international standards, norms, and laws.²

- Eliminate the “B sensitive” category. Define a loan as “sensitive” as per World Bank standards (cited above) or if it involves Politically Exposed Persons³ as defined by the Financial Action Task Force on Money Laundering (FATF). Meet or exceed WB Extractive Industry Review recommendations for extractive industry projects and standards of the World Bank’s Pollution Abatement Handbook and the World Commission on Dams;
- Require clearly defined analyses of environmental impacts of “no action” and other alternatives; Require not simply “mitigation” of impacts, but prevention, minimization, compensation, and improvement of environmental performance as per WB standards; commit

¹ OP. 4.01 EA, Sec.8

² The full IEE/EIA must be made available for comment, not simply summary documents.

³ See WB Environmental Assessment, OP 4.01, FATF 40 Recommendations. Politically Exposed Persons include individuals who are or have been entrusted with prominent public functions, i.e. heads of state, senior politicians, government, judicial, military officials, executives of state-owned companies, and their close associates and family members.

to a preference for “preventative measures over mitigation or compensation” as per WB; avoid “no go” zones;

- If mitigation is to occur, require that, instead of “least cost” mitigation, the mitigation results in the project producing “no significant harm” to affected communities or ecosystems, and insurance that the institutional basis for implementing mitigation measures, including environmental monitoring, is in place;
- Require that Environmental Impact Assessments for Category A projects be conducted by independent experts “not affiliated with the project” as per WB;
- For high-risk projects with complex and multidimensional environmental issues, require the establishment of an independent internationally recognized advisory panel, with members with site-specific experience to advise the ADB and the borrower during project preparation, implementation, and monitoring;
- Make monitoring reports of environmental and social impacts of ADB-financed projects and activities publicly available when they are written;
- Monitor carbon dioxide emissions associated with ADB finance and make annual reports publicly available. Institute a carbon dioxide cap for ADB’s portfolio with a requirement for clients to evaluate options to reduce project-related GHG emissions during the design and operation of the project.

Anti-Money Laundering Recommendations

- Given the link between unsustainable resource exploitation (for example, illegal logging) and money laundering⁴ and to ensure full compliance with anti-money laundering laws in the borrowing country as well as the legal requirements of ADB donor countries, EA should include an assessment the involvement of “Politically Exposed Persons” (PEP) as defined by the FATF in the project. Should the project involve any Politically Exposed Persons, the project must be classified as Category A and with a 120 day public comment period. Any such project must require Board approval, after consideration of PEP involvement, prior to implementation.

Consultation and Participation:

- Information must be made available to in-country stakeholders and potentially affected communities “in a form and language that are understandable and accessible to the groups being consulted.”⁵ Publish stakeholder views and show explicitly how the views/opinions of the stakeholders have been taken into account and influenced the EA/EIA and the project.
- Ensure that ADB-supported activities and policies are implemented only after documented Free Prior Informed Consent of indigenous and other project-affected communities.

Cofinancing:

- ADB's current requirement that all components of a project must comply with ADB's environmental assessment policy, regardless of whether or not ADB is financing a particular component, is positive and should be maintained.

⁴ A 2005 report by the Center for International Forestry Research underscores the intersection between money laundering and forest destruction. In Indonesia, high-risk forest-based projects often involve crimes such as illegal logging or the pollution of water and air by dangerous waste, leading to significant legal risks to banks. Indonesia’s new laws make financial institutions responsible for transactions involving forestry and environmental crimes. Illegal logging as a “predicate offence” for money laundering, meaning that money laundering charges and strict penalty schedules can now be applied to financial institutions engaged in projects that involve illegal timber harvesting.

⁵ “in a form and language that are understandable and accessible to the groups being consulted” – World Bank OP 4.01, Sec. 15, Disclosure

Summary of Concerns and Recommendations Regarding the Review of Asian Development Bank's Safeguard Policy on Involuntary Resettlement

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The summary comments below are based on a thorough review by International Accountability Project of the Asian Development Bank (ADB) Policy on Involuntary Resettlement (section F2 of the ADB's *Operations Manual*). The ADB Policy was compared in detail to the involuntary resettlement policies of peer institutions and to guidelines and accepted best practices under international law.⁶ These comments highlight critical areas in which the ADB Policy falls below international standards and best practice. We urge the ADB to ensure that the safeguard policies are enhanced to be consistent with international standards. (For more in-depth analysis and recommendations on the Involuntary Resettlement Policy, see the IAP full comparative policy analysis matrix, and IAP comments submitted to the OED, both available at www.accountabilityproject.org.)

We encourage the ADB to fully address the issues raised below, and to use these comments, as well as the policies and international guidelines referenced in the comments, to inform the revision of the ADB policy on involuntary resettlement. There is an urgent need to enhance ADB policy and practice in this area, as even internal ADB data shows that Bank performance on involuntary resettlement has been "almost uniformly unsatisfactory."⁷

Unique Risks of Involuntary Resettlement

The United Nations considers involuntary resettlement to be a *prima facie* violation of multiple fundamental human rights. World Bank former Vice President and General Counsel, Ibrahim Shihata, recognized involuntary resettlement as "unlike any other project activity," due to its "potential for violating individual and group rights under domestic and international law." Given the unique and severe risks of human rights violations associated with development-induced displacement, the ADB policy must make it clear that involuntary resettlement is an extreme option and a last resort.

ADB should preface its policy with a statement about the grave risks associated with involuntary resettlement. Many of the ADB's peer institutions, including the World Bank, the International Finance Corporation (IFC), the Inter-American Development Bank (IDB), and the African Development Bank (AfDB), include such an opening statement in their policies on involuntary resettlement (as do the OECD guidelines). This up-front acknowledgement of the severe negative impacts that can result from involuntary resettlement is crucial for placing a resettlement policy in its proper context and for making sure that those responsible for implementing the policy are

⁶ The policies and international guidelines to which the ADB Policy was compared are: 1) World Bank Safeguard Policy on Involuntary Resettlement; 2) IFC Performance Standard 5 on Land Acquisition and Involuntary Resettlement; 3) Inter-American Development Bank Safeguard Policy on Involuntary Resettlement; 4) African Development Bank Involuntary Resettlement Policy; 5) The OECD's *Guidelines for Aid Agencies on Involuntary Resettlement and Displacement in Development Projects*; 6) The Report of the World Commission on Dams: *Dams and Development*; 7) *Comprehensive Human Rights Guidelines On Development-Based Displacement*, adopted by the UN Expert Seminar on the Practice of Forced Evictions; and 8) *Basic principles and guidelines on development-based evictions and displacement* developed by UN Special Rapporteur on the right to adequate housing, Miloon Kothari.

⁷ *Involuntary Resettlement Safeguards Supplementary Appendixes*, "Supplementary Appendix G: Findings of a Desk Study Conducted for the Safeguard Policy Update," p. 25. <http://www.adb.org/Documents/Supplementary-Appendixes/IR-Supplementary-Appendixes.pdf>

aware of the human rights and impoverishment risks that are at play in the context of development-induced displacement and involuntary resettlement.

Policy Recommendations

- **ADB should strengthen its commitment to avoiding involuntary resettlement whenever possible** by including explicit language in the guiding principles of the policy about (a) *thoroughly exploring all viable alternative project designs*, and (b) the importance of seriously considering and evaluating, in every case, *the alternative to refrain from carrying out the project (the "non-action" alternative)*, particularly if negative impacts on affected people will be severe. This principle is a core component of the IDC and AfDB policies, as well as of the guidelines developed by the OECD and the World Commission on Dams (WCD).
- **The updated policy should ensure meaningful participation of affected people** by requiring that projects have obtained *broad community support* through *negotiated agreements*, and that project planners respect the internationally recognized right of affected peoples to give or withhold their *free prior informed consent (FPIC)* to any proposed resettlement activities.⁸ The current ADB policy falls far below international standards in this realm. The AfDB, for example, requires that “any necessary displacement is done in the context of negotiated settlements with affected communities.” The IDB policy and IFC Performance Standards require that affected indigenous peoples have given their informed consent to resettlement and compensation measures.
- The ADB policy should retain the requirement for **each involuntary resettlement activity to be designed and executed as a development project in its own right**, defined in response to affected people’s own development needs and priorities, thus ensuring that those who are most impacted by the project *also benefit* from that project. Additionally, in accordance with best practice for rehabilitation of involuntarily resettled people, the updated policy should focus on *improvement* of livelihoods and living standards rather than *restoration*. An explicit requirement for measurable improvement and resettlement-as-development should be included up front in the three core guiding principles that introduce the resettlement policy.⁹
- **Resettlement and rehabilitation should be accomplished and finalized prior to any project activities** that will cause displacement. International best practice recognizes that this requirement is central to ensuring effective rehabilitation of affected people, and that without it, affected people tend to suffer stagnation and deterioration of their living standards while they wait for years—sometimes in vain—for promised programs to be implemented.
- The ADB policy should clearly state that **compliance with the policy will be principally determined through long-term monitoring of the affected people’s living conditions** and progress in improving their standards of living, in accordance with international best practice and with ADB’s core commitment to poverty alleviation. The involuntary resettlement policies of the IDB and AfDB support this principle, explicitly stating that compliance will be determined by results of qualitative and quantitative monitoring of *conditions on the ground* at

⁸ The WCD concluded that a rights-centered approach, based on negotiated settlements and securing broad community support and FPIC, was the most effective way to achieve long-term sustainable development outcomes.

⁹ See IAP comments submitted to the OED for a description of the well-documented reasons behind the importance of requiring improvement rather than restoration. www.adb.org/evaluation/safeguardpolicy/Comments-OED-IR-26Jan07.pdf

resettlement sites. Monitoring by credible, independent third parties is crucial to the effectiveness and integrity of this approach.

- **Protection of vulnerable groups should remain a core component of the policy, and should be enhanced in several areas.** International best practice requires that the updated policy explicitly state up front that “the needs of disadvantaged groups (landless, female headed households, children, elderly, minority ethnic, religious and linguistic groups, etc.) must be at the center of the development approach” (language from AfDB policy). The ADB policy should *explicitly include children* as a vulnerable group; it should provide explicit guidelines for *ensuring that women are not disproportionately harmed* by resettlement (the AfDB policy has some model language on this issue), and it should require that *affected people without legal or “legalizable” title to land are guaranteed full entitlements*, including compensation for lost land, ideally in the form of replacement land. This policy principle of full entitlements for landless peoples is consistent with international human rights norms of non-discrimination, and necessary for upholding a focus on the protection of vulnerable groups.

We strongly urge the ADB to retain the current scope of the involuntary resettlement policy, both in terms of the definition of affected people and in terms of the policy’s applications. The current policy is consistent with international standards in defining affected people as those who are physically displaced by a project, as well as those who are “economically displaced” by loss of livelihoods or loss of access to key sources of livelihoods. The current policy recognizes that such impacts occur not only from direct project-related land acquisition, but also due to “downstream”/indirect impacts such as flooding or loss of access to forests and grazing lands. In terms of application, the current policy applies to all ADB’s operations in developing member countries, and to all components of the project, regardless of the source of funding. The ADB’s peer institutions share these scope and application requirements. In order to meaningfully safeguard against the full set of negative impacts caused by involuntary resettlement, it is necessary that the updated policy retain the same scope and applications.

Summary of Concerns and Recommendations Regarding the Review of Asian Development Bank's Policy on Indigenous Peoples

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February 2007**

The human rights-based approach to development should be operationalized by States, the United Nations system and other intergovernmental organizations, including the international financial institutions, and should be the framework underpinning the Millennium Development Goals and poverty reduction strategies, programmes and activities (United Nations Permanent Forum on Indigenous Issues, Recommendation of Fourth Session, 2005)

The Permanent Forum reaffirms and reiterates that self-determination, free, prior and informed consent and accountability form the basis of, and prerequisite for, any relationship that can be called a true partnership for development, and urges all States, indigenous peoples, United Nations bodies, international development agencies, corporations and the private sector, as well as civil society, to uphold these vital principles (United Nations Permanent Forum on Indigenous Issues Report of Fifth Session, May 2006)

Purpose of the summary:

The primary purpose of this note is to highlight key concerns about the existing ADB Policy on Indigenous Peoples and to make proposals for strengthening the contents of a revised ADB safeguard policy on Indigenous Peoples and for improving its implementation in ADB operations. It is an overview of the key concerns, and is not an authoritative treatment of all the concerns that indigenous peoples have with the existing policy, nor their demands for improvements in any new policy.

Critical analysis of the existing policy:

Scrutiny of the 1998 policy document and the most recent ADB codification of the policy in the 2006 version of its Operations Manual, confirms that the existing policy is out-of-date and requires substantial upgrading to ensure conformity with current IFI and related international standards on indigenous peoples and development. Analysis reveals a series of strengths, weaknesses and gaps that are summarised below.

Useful elements in the existing policy:

Aspects of the existing policy that may be considered useful and that should be retained and, in some cases, expanded and strengthened include:

- Application of policy standards and safeguards (in theory) to all ADB loan and other financial and technical operations that may affect indigenous peoples.¹
- A mandatory requirement for an outline initial poverty and social assessment (IPSA) for *all* public sector and private sector ADB projects

- Inclusion of lines of responsibility among ADB institutions and the Borrower for implementation and policy compliance
- A requirement in the 2006 OM for consultation with national indigenous organizations in the screening and identification processes under the policy
- Objective requirements on ADB staff and the borrower for timely publication of the draft Indigenous Peoples Development Plans (but no requirements that these be in appropriate languages – see below)
- A requirement (??) for a specific instrument such as an Indigenous Peoples’ Development Plan (IPDP) with adequate time-scales and budgets to implement safeguard measures and ensure equitable and culturally appropriate benefit sharing, and provide development opportunities to affected communities – for all projects with significant positive or negative impacts on indigenous peoples.¹⁰
- Provisions for independent monitoring of ADB operations affecting indigenous peoples

Weaknesses and gaps:

The ADB safeguard standards in its Indigenous Peoples policy are not consistent with indigenous peoples’ rights in international law, nor with related principles enshrined in intergovernmental declarations under the United Nations system. ADB standards in relation to indigenous peoples and prior consultation, prior consent, informed participation and information disclosure all fall substantially below those of other IFIs and development agencies. Significant shortfalls and lacunae in the existing policy include its:

- Lack of conformity with international standards on the rights of indigenous peoples
- Reliance on borrower legislation as the principal identifier of indigenous peoples and as the main policy trigger
- Poor definition of objective criteria that trigger the safeguard policy
- Lack of ‘no-go’ criteria (exclusion list and/or clear-cut prohibitions on ADB financing)
- Emphasis on national legislation and national development policies that may be prejudicial to the rights and interests of indigenous peoples
- Application of an outdated and narrow mitigation and compensation focus
- Lack of a rights and risks approach for policy objectives and safeguard provisions
- Failure to prohibit forced relocation of indigenous peoples
- Failure to require respect for the right to free, prior and informed consent (FPIC)
- Omission of objective safeguards to protect indigenous peoples’ land and resource rights
- Lack of requirements to protect collective and customary rights
- Failure to require informed and culturally appropriate participation of indigenous peoples’ in initial and full poverty and social impact assessments
- Defective information disclosure and participation standards that fail to require the provision of information in appropriate languages

Problems with policy application and implementation:

Despite having *internal* compliance mechanisms at the ADB that are comparable with other IFIs,¹¹ the ADB’s own evaluations and those of NGOs and independent and community organisations find that

¹⁰ This requirement is somewhat ambiguous in the 1998 Policy, the 2006 Operations Manual and in recent ADB summaries of its safeguard requirements (see Annex).

¹¹ See – Appendix 2: “Safeguard Policy Compliance” in ADB (2005) *Safeguard Policy Update: a discussion note* October, 2005

implementation of the Indigenous Peoples Policy (like other safeguard policies) has been superficial, of poor quality or entirely lacking.

The effectiveness of the ADB safeguard depends on three vital activities and related procedures: (i) investment screening and the accurate evaluation of potential impacts of proposed operations through initial and full poverty and social assessment; and (ii) appropriate project design that fully addresses issues identified in social and environmental assessments; and (iii) effective implementation of safeguard measures and oversight of adequate indigenous peoples' plans or indigenous components. If any these activities are absent, superficial or defective the usefulness of the safeguard policy is seriously undermined.

Regrettably, examination of ADB projects has found that screening and social assessment has sometimes failed to identify potential negative social and cultural impacts on affected indigenous peoples. Examples include the ADB-financed *Chittagong Hill Tracts Rural Development Project* (CHTRD) in Bangladesh, the *Girls' Basic Education Project* in Laos and the *Chasma Right Bank Irrigation Project* in Pakistan.¹² In other cases, like the *Sunderbans Biodiversity Conservation Project* – also in Bangladesh, the Indigenous Peoples Development Plan has not been prepared in direct violation of policy requirements.¹³

In other cases, where an IPDP has been prepared it has failed to avoid adverse impacts resulting from the ADB loan operation and in some cases has even assisted government programmes that violate indigenous peoples' land and resource rights and undermine their traditional livelihoods.¹⁴

One major criticism of implementation to date is that ADB staff have often failed to assess potential negative impacts within a broader rights framework due to the application of a narrow and defective economic and project-based framework for social analysis.¹⁵

A more complete picture of the quality of the application of the existing policy will be forthcoming in early 2007 with the publication of the OED's *Special Evaluation Study of the Indigenous Peoples Safeguard Policy*. It is anticipated that this study will confirm the poor quality of implementation documented by NGOs and communities.

Recommendations for policy revision:

The above summary confirms that policy revision must address weaknesses and gaps in the policy contents and related due diligence procedures, particularly poverty and social assessment methods and quality control. It is also essential that oversight and compliance mechanisms are strengthened. To this end, it is recommended that the ADB (see annex for full recommendations):

- Adopt a rights-based framework for safeguard objectives and its policy requirements
- Include 'no-go' criteria for ADB financing in relation to indigenous peoples
- Ensure standards conform with international standards, including the UN Declaration on the Rights of Indigenous Peoples (UNDRIP)
- Use objective criteria to define the policy trigger. Trigger criteria must address not only project-based operations, but also other ADB operations.

¹² Oxfam (2007) *Safeguarding or Disregarding? Communities' experiences with the ADB's safeguard policies* Forthcoming

¹³ Hossain J and Roy K (2007) *Sunderbans Biodiversity Conservation Project – a case study from a peoples' perspective* Unnayan Onneshan and Nijera Kori, Dhaka - forthcoming

¹⁴ Roy, D (n.d.) *The Asian Development Bank's Indigenous Peoples' Policy and its Impact on Indigenous Peoples of Asia* manuscript

¹⁵ Oxfam (2007) *op. cit.*

- Adopt a bank-wide mandatory and operational policy on social assessment or integrated Social and Environmental Assessment
- Incorporate rights and risk analysis in the assessment process, including human rights impacts assessment
- Ensure that the revised Indigenous Peoples Policy and the new Social Assessment policy have binding rules that require the informed and culturally appropriate participation of affected indigenous peoples in the assessment process
- Strengthen binding provisions to require informed and culturally appropriate participation, including participation in social assessments – as noted above
- Make clear distinctions between mandatory and optional policy provisions.
- Remove loopholes that give discretion to borrowers or clients as to where safeguard standards may or may not apply.
- Keep the mandatory requirement to consult with national indigenous organisations during project screening and expand this to include “local indigenous organisations”
- Incorporate the accepted international standard of FPIC in an updated policy and use this precise term as accepted in international law
- Apply the FPIC safeguard at each stage of the project cycle
- Require independent third-party verification mechanisms to document the existence or absence of prior consent.
- Require provision of relevant information to affected communities and their representative organisations in local languages or languages tailored to local preferences
- Expressly prohibit forced relocation
- Include objective and actionable standards to safeguard indigenous peoples’ rights to their traditional lands and customary resources where these may be affected by ADB operations
- Adopt explicit standards to recognise and protect indigenous peoples’ collective and customary rights (e.g., as a mandatory component in an IPDP or IPPF)
- Include a requirement for approval of draft IPDPs by affected communities and their freely chosen representatives and that the terms of agreement for IPDP design and implementation be documented as part of the final plan.
- Include requirements for ADB staff to mainstream human rights, including indigenous peoples’ human rights, in country programming and upstream policy dialogues with governments

Inclusion of indigenous peoples in the revision process:

One of the main criticisms of the existing ADB policy is that it was developed with only minimal participation by indigenous peoples. To be credible and effective, the ADB must ensure that indigenous peoples are fully involved in the revision process. The Bank should establish regional consultations with indigenous peoples’ organisations in Asia to identify where necessary and progressive revisions to the ADB policy should be made. Crucially, it must take steps to ensure that the revised policy provisions are acceptable to indigenous peoples and that they consider the updated safeguards adequately safeguard their rights and interests.

Indigenous peoples must also be involved in related standard-setting processes like the current formulation of standards for poverty and social assessment and the forthcoming review of the ADB accountability mechanism (as already noted, it is recommended that the revised social assessment procedures be consolidated as part of a new ADB operational safeguard policy on social assessment).

Need for improved implementation and greater accountability:

Once a new revised Indigenous Peoples policy and more robust social assessment framework are adopted, it is essential that the ADB establish stronger quality control, monitoring, compliance and accountability mechanisms.

It is recommended that the ADB introduce *positive incentives* for ADB staff and implementing agencies to implement safeguard standards. The Bank should also require culturally appropriate provision of draft monitoring reports, including independent reports, to affected communities and ensure their views on implementation are accurately documented (if they choose to make comments).

More explicit provision for independent and third-party monitoring of ADB projects and programmes by indigenous peoples' organisations should also be incorporated into a revised policy. Additional measures must also be taken to make sure monitoring information is channelled to corrective and grievance mechanisms in a strengthened ADB compliance and accountability framework. These new oversight and accountability measures should be formulated in consultation with indigenous peoples and civil society.