

**CONCERNS REGARDING THE INVOLUNTARY RESETTLEMENT PROVISIONS OF ADB'S 2<sup>ND</sup> DRAFT  
SAFEGUARD POLICY STATEMENT**

***Submitted by International Accountability Project***

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I. INTRODUCTION

The International Accountability Project welcomes this opportunity to provide commentary upon the Second Draft of the Safeguard Policy Update.

We appreciate the willingness of the ADB to revise the current safeguard policies and support its stated goal of harmonization across international financial institutions (IFIs) and with international standards. Our support for ADB's efforts to realize its stated goals is tempered only by our grave concerns about the Second Draft's capacity to realize these goals. As the following analysis and associated matrix illustrates, the Second Draft misses many opportunities to bring ADB's current standards into harmony with other leading public multilateral banks.<sup>1</sup>

Of even greater concern are the frequent revisions that dilute the potency of the ADB's involuntary resettlement safeguards. The extent of these dilutions is such that individuals involuntarily resettled under the proposed changes would be at a greater risk of impoverishment than if they were displaced under the existing policy. While some of the regressive measures are due to non-substantive issues such as vague language, a large number are caused by direct substantive revisions that weaken the current protections.

Finally, we view this as an unacceptable missed opportunity for the ADB to integrate their safeguards with international human rights norms and law, and explicitly embrace a rights-based approach to development. The ADB itself has a distinct personality under international law and is "bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties."<sup>2</sup> Moreover, every ADB member state has consented to be bound by the terms of the International Covenant of Economic, Social and Cultural Rights (ICESCR).<sup>3</sup>

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<sup>1</sup> Annex 1 provides specific changes recommended to the Section V: The Draft Safeguard Policy Statement and Draft SR 2 - Involuntary Resettlement: Draft Safeguard Requirements for Borrowers/Clients 2.

<sup>2</sup> Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion of 20 December 1980, International Court of Justice Reports of Judgments, Advisory Opinions and Orders, ¶ 37 at 89-90. While there is debate over the extent to which IFIs are, in general, governed by international legal norms, the ADB is, *at the minimum*, obligated to respect the legal norms of its member countries, which have unanimously consented to be bound by ICSCR. In light of this, any safeguard policy such as the Second Draft in which there is a notable regression from the norms binding all member states has marginal legitimacy if for no other reason than by *pacta sunt servanda*. Vienna Convention on the Law of Treaties Vienna, UN Doc. A/Conf.39/27 (1969) 1155 U.N.T.S. 331 entered into force on 27 January 1980.

<sup>3</sup> The International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966) 993 U.N.T.S. 3 entered into force Jan. 3, 1976 [hereinafter: ICESCR]; U.N. CESCR, General Comment No. 4: The Right to Adequate Housing, 6<sup>th</sup> Sess., U.N. Doc. E/1992/23 (1991) [hereinafter: General Comment 4]; U.N. CESCR, General Comment No. 7: The Right to Adequate Housing: Forced Evictions, 16<sup>th</sup> Sess., U.N. Doc. E/1998/22 (1997) [hereinafter: General Comment 7]; General Comment 2 *supra* note 3 at ¶¶ 6 & 8(d) [hereinafter: General Comment 2].

ADB risks violating these obligations through proposing a new policy document that constitutes a substantive regression from established global standards.<sup>4</sup>

Considering the scope of the reforms necessary, the following analysis focuses upon the objective, scope and policy principles for involuntary resettlement. The development of policy principles that have the support of critical stakeholders will facilitate the necessary reformation of the safeguard requirements. To that end, the following are critical flaws that should be addressed in any future revisions.

## II. MAJOR THEMATIC CONCERNS PERVASIVE THROUGHOUT THE POLICY PRINCIPLES AND SAFEGUARD REQUIREMENTS

### A. Apply the policy to all displaced persons – not merely those displaced by direct land acquisition

The proposed Involuntary Resettlement Safeguard Policy fails to protect all physically or economically displaced persons because the scope excludes all persons displaced by actions other than the involuntary acquisition of land or involuntary restriction on land use. This limitation is of even greater concern because land acquisition is undefined, which creates the possibility that only persons who have their land expropriated may be protected by the IR policy. Impacts such as loss of access to fisheries downstream of a dam, or loss of arable farmland because of declining water tables due to mining, for example, are not recognized by the Second Draft as ADB project-induced displacement.

The Second Draft does not acknowledge displacement induced by these types of changes as involuntary resettlement. Instead, it relegates responsibility for addressing non-land-acquisition impacts to the Environmental Safeguards, which are not designed to address the unique social and economic risks associated with loss of access to resources or livelihoods. Considering that the numbers of such people are growing due to increasing investment in large hydropower and mineral extraction projects, the ADB's failure to design a policy framework to protect this category of individuals must be remedied.

### B. Prohibit rehabilitation schemes based on cash compensation and establish an explicit preference for land-for-land compensation

The draft policy language allows borrowers to provide cash compensation alone for any negative effects resulting from project activities. This problematically includes instances when a project expropriates land from persons with land-based livelihoods. Each instance where land-based compensation is recognized as a compensation option is undermined by granting borrower discretion to select the form of compensation. Whereas the existing Policy states an explicit policy preference for land-based strategies, the Second Draft has no equivalent language. Nor is there any explicit statement that cash compensation alone is likely to result in impoverishment and must therefore be merely one measure of a multi-pronged approach in all but the most exceptional circumstances: i.e. when there is an independently-verifiable preference/agreement among affected persons for a compensation-focused approach, reached through genuine consultation.

The last two decades of economic and social science research on involuntary resettlement has firmly established the fact that cash-based compensation reliably results in

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<sup>4</sup> *Protect, Respect and Remedy: A Framework for Business and Human Rights*, Report of the Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, April 7, 2008, ¶ 61.

impoverishment of the affected population.<sup>5</sup> The consistent results of applying a cash-based compensation scheme are, *inter alia*, joblessness, landlessness, homelessness, migration to urban slums and food insecurity. Given this outcome, the decision to focus on cash-based compensation is inappropriate and will create new poverty among affected populations.

C. Require improvement of livelihood and living standards for all affected people and define improvement objectives in consultation with affected persons

The Second Draft policy fails to require improvement across the board for all affected persons' livelihoods and standards of living. It permits mere restoration of living standards for all displaced persons who have not been identified as "poor and vulnerable." The Second Draft also fails to define adequately the term "poor and vulnerable," which leaves this critical definition up to the borrower's/client's discretion rather than relying upon objectively verifiable indicators.

Repeated studies have shown that a policy requirement for restoration, rather than improvement, of livelihoods leads to impoverishment of affected people. In contrast, the few instances where improvement objectives were developed in consultation with the affected population have created development opportunities rather than poverty within the displaced population. A growing number of developing member countries, including China, now regularly implement innovative benefit-sharing models to transform resettlement and rehabilitation into equitable development programs for displaced people. Considering the ADB's well-documented and poor track record on resettlement to date, it is unacceptable for ADB to continue using a policy approach that creates new poverty when development opportunities could be generated for the very persons who sacrifice the most for a project.

The final report of the World Commission on Dams makes the following strong statement on this issue:

Impoverishment of affected people is increasingly seen as unacceptable but it is also unnecessary since there are a wide range of opportunities available for making not only resettlers, but all affected people project beneficiaries. This is in the interests of all stakeholders since, as beneficiaries, affected people add to the stream of project benefits, while reducing costs. The problem of making them beneficiaries lies not with the affected people, who time and again have shown the capacity to respond to opportunities that are available, but with the inadequate laws, policies, plans, financing capacity and political will of governments and project authorities.<sup>6</sup>

D. Require an explicit consultation process and agreement outcomes at each stage, including appraisal of project alternatives

The new draft fails to require meaningful participation from the affected population in the formulation and implementation of the project. While the Second Draft requires consultation on the resettlement plan, it does not require consultation on the project design, exploration of alternatives, or monitoring and evaluation measures. Moreover, it does not specify any meaningful framework or process by which consultation should be executed,

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<sup>5</sup> Michael M. Cernea & Hari Mohan Mathur (eds.), *CAN COMPENSATION PREVENT IMPOVERISHMENT?: REFORMING RESETTLEMENT THROUGH INVESTMENTS AND BENEFIT SHARING*, Oxford 2008.

<sup>6</sup> World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, 2000, pp. 108-109. <[www.dams.org/report/](http://www.dams.org/report/)>

nor does it require a measurable result from the consultation.

Meaningful participation by the affected community can result in less impoverishment, stronger development outcomes and lessened conflict generated by development projects. Mere requirements for consultation do not mitigate these consequences, as limited borrower resources and asymmetric information and familiarity with resettlement and development projects frequently inhibit the consultation process. The Second Draft thus needs a clear *process* framework to ensure that consultation is not simply information dissemination by the implementing agency. The Second Draft must also require a specific obligation of *result* (consent/agreement) from the consultation process that is objectively verifiable. Finally, meaningful consultations must be conducted on alternative project designs and project alternatives, both to realize the policy's guiding principle of avoiding resettlement where possible, and also to comply with Article 11 of the International Covenant on Economic, Social and Cultural Rights as clarified through General Comments 4 and 7.

### III. MAJOR STRUCTURAL WEAKNESSES AND RECURRING CONCERNS REGARDING THE SECOND DRAFT

#### A. Format

The current version of Policy Principles appears to have been forced into a one-page format, as evidenced by the principle's strikingly small font and lack of specificity. This formatting decision appears at least partially responsible for the Second Draft's dilution from the 1995 Involuntary Resettlement standards. The sacrifice of specificity and clarity for formatting concerns raises serious concerns about the ADB's commitment to retaining substantive protections.

#### B. Vague language

The Second Draft fails to use objectively verifiable indicators when identifying the obligations of the borrower/client. The language employed often creates ambiguity as to when the borrower/client must act, the result which their actions should achieve, and the manner in which the actions should be conducted.<sup>7</sup> Without these details provided for, the policy will be unimplementable and unmeasurable in most instances because the borrower/client will have wide discretion over the application of the safeguard policies. This will create significant and unnecessary strain on the time and resources of ADB's already understaffed safeguard personnel, due to constant disagreements and conflicting interpretations among ADB, implementing agencies and other actors. A clear policy is essential for effective and efficient safeguard implementation.

For example, paragraph 22 is structured as a trigger that imposes an obligation when a specific instance occurs. The instance in question is when a project is deemed "highly complex and sensitive" an additional set of safeguards must be applied to the project.<sup>1</sup> However, it is unclear when a project would qualify as "highly complex and sensitive," nor is there any means for a third party to objectively verify that a project was highly complex and sensitive. The Second Draft also fails to specify who makes the "highly complex and sensitive" determination. While the borrower/client would presumably have that obligation, as most of the duties within the Safeguard Requirements are oriented upon the borrower/client,

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<sup>7</sup> The Safeguard Policy Statement (Second Draft), October 2008 ¶ 22 ("For highly complex and sensitive projects, independent advisory panels during preparation and implementation of projects will be used.") [hereinafter: Second Draft].

this would create a conflict of interests in which the borrower/client would effectively be voluntarily inducing a need to comply with greater operating restrictions. Finally, there is no clarity as to when said determination must be made, despite the obvious need for such an analysis to be conducted as early in the project cycle as possible to ensure the appropriate allocation of resources.

The vagueness and lack of operational specificity illustrated by the above example is indicative of the overwhelming majority of obligations within the Second Draft. This sub-standard drafting is unacceptable for any policy document that aims to be implementable, much less monitored and evaluated. Any forthcoming revision should employ language that clearly defines the following:

- 1) who the decision-makers and duty-bearers are for all aspects of the safeguard policy that require direct implementation;
- 2) the external and objectively verifiable indicators that trigger duties upon the borrower/client/ADB;
- 3) a timeline for the realization of said duties;
- 4) and specific milestones that indicate the completion of said duties.

All language that permits subjective decision-making should be avoided considering the asymmetry of power between borrower/clients and the affected population. When such instances are unavoidable or infeasible, then the decision-making process should be based on genuine consultations and agreement with the affected population. Finally, if the revised policy must contain any vague principles or requirements due to drafting accessibility, these should be systematically supported through simultaneously drafted auxiliary documents.<sup>8</sup>

#### C. Time-bound implementation schedule and achievement of milestones prior to project initiation

The Second Draft fails to create an appropriate incentive structure for clients/borrowers and the ADB itself to ensure the realization of safeguards. This can be easily accomplished by awarding contracts and disbursing funds only after agreed-upon rehabilitation milestones have been achieved and independently verified. Without these triggers, the ADB will continue its unacceptable pattern of social and environmental mitigation consistently lagging behind the completion of the civil works.<sup>9</sup> Any forthcoming revisions must obligate the borrower/client to propose a time-bound schedule for implementing the resettlement plan that includes a date by which agreed-upon livelihood improvement will be achieved.<sup>10</sup> The ADB must also be prohibited from dispersing funds for project activities that will negatively impact the population until the rights and livelihoods of the displaced people are secured.<sup>11</sup>

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<sup>8</sup> See e.g. IFC, Guidance Notes: Performance Standard on Social & Environmental Sustainability, 31 July 2007 [hereinafter: IFC PSSES].

<sup>9</sup> See e.g. The NGO Forum on Cambodia & Resettlement Action Network, *Report on Field Survey of the Resettlement Impacts caused by National Highway 1 Improvement Project*, February 2008.

<sup>10</sup> See e.g. World Bank, Operational Policy, OP 4.12 Annex A, December 2001, ¶ 18 (“The [Resettlement Implementation] schedule should indicate how the resettlement activities are linked to the implementation of the overall project.”) [hereinafter: WB OP 4.12].

<sup>11</sup> *Id.* at ¶10 (“The implementation of resettlement activities is linked to the implementation of the investment component of the project to ensure that displacement or restriction of access does not occur before necessary measures for resettlement are in place.”).

D. Focus on borrower/clients rather than affected people

The substantive focus of the Second Draft is upon the needs of ADB and its clients/borrowers rather than mitigating the risks of impoverishment associated with involuntary resettlement.<sup>12</sup> Rather than focusing on protecting the displaced, the Second Draft seems preoccupied with minimizing the liability of the borrower/client. Examples include, but are not limited to, the following:

- the limited scope of the involuntary resettlement policy that unconscionably excludes a wide range of the individuals who suffer displacement impacts;
- the shift of responsibility for all “social or environmental impacts from project activities other than land acquisition” *including involuntary resettlement* from the involuntary resettlement principles to environmental assessment;
- the decision to disfavor land-based solutions for most economically displaced persons, despite the substantial research showing that compensation-based mechanisms lead to impoverishment;
- the failure to offer adequate procedural or results-based protections for individuals engaged in pre-expropriation negotiations to account for the inherent asymmetric bargaining power;
- the elimination of the benefit-sharing requirement as proposed in the July 2007 Draft;<sup>13</sup>
- the failure to require consultation on the project design and project alternatives to avoid resettlement.

Each of these decisions sacrifices the protections, participation and empowerment of the affected population for a solution that limits costs and obligations upon the borrower/client.

IV. OBJECTIVES, SCOPE AND POLICY PRINCIPLES ON THE INVOLUNTARY RESETTLEMENT SAFEGUARDS

A. Objectives

“To avoid involuntary resettlement wherever feasible, and minimize involuntary resettlement through exploring project and design alternatives, and enhance, or at least restore the livelihoods of all affected persons in real terms relative to pre-project levels and improve the standards of living of the affected poor and other vulnerable groups.”

1. *Duty to avoid involuntary resettlement where possible and to minimize through alternatives must be principles.*

The statement of basic principles in the 1995 Involuntary Resettlement policy begins “(i) Involuntary resettlement should be avoided where feasible. (ii) Where population

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<sup>12</sup> See Michael M. Cernea, *IRR: An Operational Risks Reduction Model for Popular Resettlement*, Hydro Nepal: Journal of Water, Energy and Environment, Vol. I, Issue No. 1, 2007, pp. 35-39, (noting the risks of impoverishment associated with involuntary displacement).

<sup>13</sup> ADB, Consultation Draft of the Safeguard Policy Statement, October 2007, Objectives, Scope and Policy Principles on the Involuntary Resettlement Safeguards, Principle 2 [hereinafter: Consultation Draft] (“Improve or at least restore livelihoods of all affected households through (a) land-based resettlement strategies when livelihoods are land-based, and cash compensation at replacement value for land when the loss of land does not undermine livelihoods; b) prompt replacement of assets and access to assets of equal or higher value; (c) prompt compensation at full replacement cost for assets that can not be restored, and (d) where feasible, additional revenues and services through benefit sharing schemes. ... Integrate resettlers economically and socially into their host communities, and extend project benefits to host communities.”)(emphasis added).

displacement is unavoidable, it should be minimized by exploring all viable options.”<sup>14</sup> While similar statements are included as objectives, the Second Draft is a dramatic regression from this standard because the objective paragraph lacks binding effect. These basic tenets of involuntary resettlement are therefore transformed from binding policy principles to merely aspirational objectives.<sup>15</sup> The exclusion of this language from the guiding principles is an unacceptable regression from the ADB’s current standards, the standards employed by other multilateral development banks, and a missed opportunity to integrate the international human rights law into the safeguard policies.<sup>16</sup>

Recommended Edit: Insertion of a new Principle 1 & 2

Principle 1: Involuntary resettlement should be avoided where feasible.

Principle 2: Where population displacement is unavoidable, it should be minimized by exploring all viable options.”

## 2. *Exploration vs. Assessment vs. Appraisal*

The new draft uses the phrase “exploring project and design alternatives” instead of “assessing project alternatives and alternative project designs” as per the Consultation Draft.<sup>17</sup> This shift is minor, but echoes a dominant concern of the Second Draft: the lack of any obligation to consult the affected population about alternatives to the project and alternative designs. The obligation merely “to explore” does not presume existence of either project alternatives or alternative project designs. In contrast, “assessing,” as employed by the 2007 Consultation Draft, presumes the existence of the object subject to the assessment.<sup>18</sup>

While “assess” would signify an improvement over the current draft, the term itself is weak in comparison to the operative language within the Second Draft. The glossary defines the term “appraisal,” as “an overall assessment of the relevance, feasibility and potential sustainability of a project prior to its approval.”<sup>19</sup> Were it to be employed, the term “appraisal” would then presume the existence of project alternatives and alternate designs, and require a feasibility and sustainability review which should include a comparison of the

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<sup>14</sup> ADB, Involuntary Resettlement Policy, 1995 ¶ 34 (i) & (ii) [hereinafter: 1995 Policy].

<sup>15</sup> As noted by the ADB’s own Office of the General Counsel, “There is an important difference between Objectives and Principles. They do not have the same legal or prescriptive effect. An objective is a goal to head towards. A principle guides action: it is more prescriptive. If a statement is included as an objective and not as a principle it will not set the benchmark for action for either ADB staff or testing of equivalence for country systems.” Memo by Eveline N. Fisher, Deputy General Counsel, to Shyam Bajpai, Acting Director General, *Consultation Draft of the Safeguard Policy Statement*, 23 August 2007.

<sup>16</sup> ICESCR *supra* note 3 at Article 11; *See e.g.* WB OP 4.12 *supra* note 10 at ¶2(a). Please note that an argument could be presented that “forced evictions only occur under General Comment 7 if they are not conducted in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.” This argument is valid insofar as expropriation is not inherently a human rights violation, but this argument is predicated purely on the theoretical and ignores the reality of how forced evictions are conducted. In fact, it was this reality that legitimates a presumption that forced evictions will result in human rights violations but for compliance with General Comment 7 and implementation of multilateral development banks’ safeguard policies.

<sup>17</sup> Consultation Draft *supra* note 13 at Objectives, Scope and Policy Principles on the Involuntary Resettlement Safeguards.

<sup>18</sup> *Id.*

<sup>19</sup> Second Draft *supra* note 7 at Glossary.

project to the “without-project” circumstances.<sup>20</sup> Moreover, such a shift would be a significant step towards integrating the language and substance of General Comment 7 to the ICESCR into the Second Draft.<sup>21</sup>

Recommended Edit: Adoption and strengthen Consultation Draft language

“To avoid involuntary resettlement wherever feasible, and minimize involuntary resettlement through ~~exploring~~ **appraising** project and design alternatives, and enhance, or at least restore the livelihoods of all affected persons in real terms relative to pre-project levels and improve the standards of living of the affected poor and other vulnerable groups.”

Recommended Edit: Insertion of a new Principle 1 & 2

“Principle 1: Involuntary resettlement should be avoided where feasible.

Principle 2: Where population displacement is unavoidable, it should be minimized by ~~exploring~~ **appraising** all viable options, **including the without-project alternative.**”

Recommended Edit: Glossary:

“Appraisal: An overall assessment of the relevance, feasibility and potential sustainability of a project prior to its approval **in which the costs of resettlement, like the costs of other project activities, are treated as a charge against the economic benefits of the project; and any net benefits to resettlers (as compared to the “without-project” circumstances) are added to the benefits stream of the project.**”

### 3. *Restoration vs. Ensuring Improvement of Livelihoods*

Social scientists, economists, implementing agencies and NGOs have come to a strong consensus that multilateral development banks must abandon the restoration of livelihoods and living standards and commit to requiring improvement in the livelihood and quality of life for all project-affected people, long term.<sup>22</sup> As prior studies have shown, application of the restoration standard increases the likelihood that the displaced population will be impoverished.<sup>23</sup> Yet, the Second Draft lowers the existing standard and ignores the past decade of research.<sup>24</sup> The decision to not require an improvement goal raises questions as to the drafter’s commitment to realizing the Asian Development Bank’s primary goal of poverty reduction. The policy must explicit requirement “livelihood” improvement and not simply standards of living, as the latter can leave affected people with replaced housing but no means to earn an income or put food on the table. Far too many resettlement sites have been abandoned when affected people were left without any means to sustain an income.

Recommended Edit:

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<sup>20</sup> WB OP 4.12 *supra* note 10 at ¶20.

<sup>21</sup> General Comment 7 *supra* note 3 at ¶ 13 (“States parties shall ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force.”); General Comment 4 *supra* note 3 at ¶ 18 (“instances of forced eviction are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances”).

<sup>22</sup> See International Accountability Project, Comments on the OED Special Evaluation Study on Involuntary Resettlement, January 2007 available at [www.accountabilityproject.org](http://www.accountabilityproject.org).

<sup>23</sup> *Id.*

<sup>24</sup> See e.g. ADB, Operations Manual, OM Section F2/BP, 25 September 2005, ¶ 1 [hereinafter: ADB F2/BP] (“The involuntary resettlement policy provides an effective opportunity for people who dispossessed or displaced *to achieve development benefits.*” (emphasis added)).

“To avoid involuntary resettlement wherever feasible, and minimize involuntary resettlement through ~~exploring~~ **appraising** project and design alternatives, and enhance, ~~or at least restore~~ the livelihoods of all affected persons in real terms relative to pre-project levels and improve the standards of living of ~~the affected poor and other vulnerable groups~~ **all persons affected by project activities with particular consideration towards protecting all vulnerable groups.**”<sup>25</sup>

#### 4. *Failure to recognize the risks of impoverishment associated with involuntary resettlement*

The Second Draft lacks a front-end statement about the severe and unique risks associated with involuntary resettlement, which is a regression from the Consultation Draft.<sup>26</sup> This omission is also inconsistent with the policies of other public multilateral development banks, all of which open their IR policies with a lengthy statement of the risks involved and the importance of safeguard measures to mitigate and prevent these risks.<sup>27</sup> The recognition of the risks of impoverishment provided greater context for the human impacts of resettlement. Moreover, it transforms the policy principles and safeguards from merely avoiding resettlement as an independently negative action to a document that addresses the negative individual impacts that are derived from forced displacement.

Recommended Edit:

**“In recognition of the risks of impoverishment associated with involuntary resettlement, the Objective of the Involuntary Resettlement Policy Principles and Safeguard Requirements is to avoid involuntary resettlement wherever feasible, and minimize involuntary resettlement through ~~exploring~~ **appraising** project and design alternatives, and enhance, ~~or at least restore~~ the livelihoods of all affected persons in real terms relative to pre-project levels and improve the standards of living of ~~the affected poor and other vulnerable groups~~ **all persons affected by project activities with particular consideration towards protecting all vulnerable groups.**”**

Recommended Edit: Safeguard Requirement – Involuntary Resettlement: Include statement of risks from Consultation Draft

**“¶1: ADB experience indicates that involuntary resettlement (IR) under development projects, if unmitigated, could give rise to severe economic, social, and environmental risks: production systems are dismantled; people face impoverishment when their productive assets or income sources are lost; people are relocated to environments where their productive skills may be less applicable, and the competition for resources greater; community institutions and social networks are weakened; kin groups are dispersed; and cultural identity, traditional authority, and the potential for mutual help are diminished or lost.”**

#### B. Scope

“The Policy covers physical displacements (relocation or loss of shelter) and economic displacements (loss of assets, access to assets, or income sources or means of livelihoods) as a result of (i) involuntary acquisition of land, (ii) involuntary restriction on land use or access to

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<sup>25</sup> This recommendation that all persons be entitled to project benefits in no manner should be construed as any failure to recognize the importance of specialized procedures and protections for vulnerable groups such as women, elderly, children, or minorities.

<sup>26</sup> Consultation Draft *supra* note 13 at Attachment B: Safeguard Requirements for Borrowers/Clients, ¶ 1.

<sup>27</sup> See also WB OP 4.12 *supra* note 10 at ¶10; Inter-American Development Bank, Sectoral Operational Policies, OP 710, 1994, Sec. IV,3 [hereinafter: IADB SOP]; African Development Bank, Involuntary Resettlement Policy, 2003, ¶ 1.1.4.

legally designated parks and protected areas. It covers them whether such losses and involuntary restrictions are full or partial, and permanent or temporary.”

1. *Include changes in land or access to land as well as access to natural resources*

The scope fails to ensure that all persons displaced by an ADB project are protected by the safeguard policy, and therefore is a dilution from the existing policy.<sup>28</sup> The Second Draft limits its protections and entitlements to only those displaced by “land acquisition.” This term is undefined and is therefore ambiguous as to if it should be narrowly construed to mean direct expropriation exclusively, or if it should be broadly interpreted to include impacts on lands caused by acquisition and project activities, such as construction upon neighboring land. This vagueness is of concern because it greatly increases the likelihood of inconsistent policy application across projects.

Beyond the ill-defined term “land acquisition,” the Second Draft excludes thousands of families who will be displaced from the protections they would receive under the current policy by excluding “changes in land or access to land” and “access to natural resources” and by not recognizing the adverse health impacts that can be caused through environmental damage.<sup>29</sup> Of particular concern are persons downstream of dams that lose access to sustainable livelihoods due to changes in river flow and volume, or persons within a watershed that is altered through extractive industries.<sup>30</sup>

This concern is heightened in light of the glossary definition of “assets,” which is “physical property and/or rights that have monetary, cultural or religious value to a person or household or a community. Assets can comprise personal property or common property.”<sup>31</sup> The glossary, however, does not define “common property,” which creates ambiguity as to whether “assets” includes communal rights to access and use natural resources like rivers, or is limited to structures shared by the community. In contrast, Footnote 3 of the current Operations Manual clearly covers all project-affected people and forms of community property: “The term affected person includes any people, households, firms, or private institutions who, on account of changes that result from the project will have their (i) standard of living adversely affected; (ii) right, title, or interest in any house, land (including residential, commercial, agricultural, forest, and/or grazing land), water resources, or any other moveable or fixed assets acquired, possessed, restricted, or otherwise adversely

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<sup>28</sup> ADB F2/BP *supra* note 14 at ¶ 2 (“Involuntary resettlement” addresses social and economic impacts that are permanent or temporary and are (i) caused by acquisition of land and other fixed assets, (ii) by change in the use of land, or (iii) restrictions imposed on land as a result of an ADB operation. An “affected person” is one who experiences such impacts.”) & Footnote 3 (“The term affected person includes any people, households, firms, or private institutions who, on account of changes that result from the project will have their (i) standard of living adversely affected; (ii) right, title, or interest in any house, land (including residential, commercial, agricultural, forest, and/or grazing land), water resources, or any other moveable or fixed assets acquired, possessed, restricted, or otherwise adversely affected, in full or in part, permanently or temporarily; and/or (iii) business, occupation, place of work or residence, or habitat adversely affected, with or without displacement.”).

<sup>29</sup> *Id.*

<sup>30</sup> This argument also applies to any substantial modification communal resources such as a pit mine inducing a lowering of the water table within the watershed.

<sup>31</sup> Second Draft *supra* note 7 at Glossary.

affected, in full or in part, permanently or temporarily; and/or (iii) business, occupation, place of work or residence, or habitat adversely affected, with or without displacement.”<sup>32</sup>

Compounding all of the above concerns is the Second Draft’s delegation of responsibility for addressing impacts of displacement caused by all (?) project actions other than land acquisition to the Environmental Safeguards (ES). The language, structure and implementation protocols for the ES are not designed to address the unique risks associated with displacement. For instance, the ES does not mention the social procedures and protections needed to ensure that affected people’s rights and livelihoods are respectively upheld and improved. Beyond the inadequacy of the text itself, the ADB and the borrower/client agency responsible for implementing environmental analysis and safeguard lack the resources, expertise, , or capacity to appropriately manage the social issue of involuntary resettlement. The ADB must eliminate this egregious dilution and ensure that there is an adequate staff with specialized training and capacity to manage the unique social challenges associated with involuntary displacement.<sup>33</sup>

Recommended Edit:

“The Policy covers physical displacements (relocation or loss of shelter), ~~and~~ economic displacements (loss of assets, access to assets, or income sources or means of livelihoods) **and cultural dislocation** as a result of (i) acquisition of land, (ii) **changes in land use or access to land**, (iii) involuntary restriction on land use or access to **natural resources including** legally designated parks and protected areas, **and (iv) changes in environment leading to health concerns**. It covers them whether such losses and involuntary restrictions are full or partial, and permanent or temporary.”

Recommended Edit: Glossary: Insert revised “Involuntary Resettlement” definition from current Operations Manual F2/BP ¶ 2

“**Involuntary resettlement**: Involuntary resettlement addresses social and economic impacts that are permanent or temporary and are (i) caused by acquisition of land and other fixed assets, (ii) by change in the use of land, ~~or~~ (iii) restrictions imposed on land as a result of an ADB operation **or (iv) negotiated settlement**. An ‘affected person’ is one who experiences such impacts.”

Recommended Edit: Glossary: Insert “Affected Person” definition from current Operations Manual F2/BP Footnote

“**Affected People**: ~~Those who may be impacted by a project financed by ADB. Such impacts may be positive or negative.~~ Any people, households, firms, or private institutions who, on account of changes that result from the project will have their (i) **livelihood or** standard of living adversely affected; (ii) right, title, or interest in any house, land (including residential, commercial, agricultural, forest, and/or grazing land), water resources, or any other moveable or fixed assets acquired, possessed, restricted, or otherwise adversely affected, in full or in part, permanently or temporarily; and/or (iii) business, occupation, place of work or residence, or habitat adversely affected, with or without displacement.”

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<sup>32</sup> Further ambiguity can be found in the undefined terms “income sources” and “means of livelihoods” as they are undefined. ADB F2/BP *supra* note 14 at Footnote 3.

<sup>33</sup> It is important to recognize the different impacts that physical, economic, cultural or environmental displacement can have on families, and it is equally important to ensure that the rehabilitation package reflects these differences. Yet, these distinctions belong under the sections discussing rehabilitation measure and delivery mechanisms. Their inclusion into the very scope of the policy increases the likelihood that individuals will not be considered within the scope of the resettlement policy *regardless if they have been displaced or not*.

Recommended Edit: Safeguard Requirement – Involuntary Resettlement: Ensure that all displaced individuals are protected by the involuntary resettlement policy

~~“3. The involuntary resettlement requirements apply to full or partial, permanent or temporary physical displacement (relocation, **loss of residential land** or loss of shelter), **and** economic displacement (loss of land, assets, access to assets, income sources or means of livelihoods), **and cultural dislocation** resulting from (i) involuntary acquisition of land, **changes in land use or access to land**, (iii) involuntary restriction on land use or access to **natural resources including** legally designated parks and protected areas, (iv) **changes in environment leading to health concerns** (iii), **and** negotiated settlement. Resettlement is considered involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement. This occurs in cases of: (i) lawful expropriation or restrictions on land use based on eminent domain; and ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.”~~

Recommended Edit: Safeguard Requirement – Involuntary Resettlement: Ensure that all displaced individuals are protected by the involuntary resettlement policy

~~“8. If potential adverse economic, social or environmental impacts from project activities other than land acquisition such as loss of access to assets or resources or restrictions on land use are identified, they will be avoided or at least minimized or mitigated or compensated for through the environmental assessment process. 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, even though no land acquisition was involved.”~~

## 2. *Elimination of the term “involuntary” from scope*

The qualifier “involuntary” should be removed from the scope of the policy principles because it creates a moral hazard by enabling governments to escape policy requirements through declaring coercive land acquisition and other forms of resettlement as “voluntary.” In such instances, the affected population would then not receive the protections and entitlements within the safeguard protections. This dangerous semantic loophole has historically been used by countries such as Indonesia where official reports claimed that forest dwelling communities have “voluntarily” given up their lands for logging and plantation development, despite the fact that these lands were seized without permission. Moreover, the scope currently used in the existing policy does not have the preface of “involuntary.”<sup>34</sup> This is another instance in which the Second Draft is a dilution from the current standards.

Recommended Edit:

“The Policy covers physical displacements (relocation or loss of shelter), ~~and~~ economic displacements (loss of assets, access to assets, or income sources or means of livelihoods) **and cultural dislocation** as a result of (i) acquisition of land, (ii) **changes in land use or access to land**, (iii) ~~involuntary~~ restriction on land use or access to **natural resources including** legally designated parks and protected areas, **and (iv) changes in environment leading to health concerns**. It covers them whether such losses and ~~involuntary~~ restrictions are full or partial, and permanent or temporary.”

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<sup>34</sup> While “involuntary” obviously is employed in the current policy, the term does not appear before any standard in terms of scope, protections or right to benefits as it does in the Second Draft. *See e.g.* ADB, Operations Manual, OM Section F2/OP, 25 September 2005, ¶ 4 [hereinafter ADB F2/OP]; 1995 Policy *supra* note 14 at ¶ 34 (iii).

3. *Include loss of residential land under physical displacement*

The term “loss of residential land” should not have been removed from the 2007 Consultation Draft as it unnecessarily excludes a set of individuals from the protections of the involuntary resettlement policy. Clearly, some individuals might lose residential land but not be displaced either physically or economically (*e.g.* a family loses some adjoining land due to a road expansion but retain their home). This family might choose to forego most protections of the involuntary resettlement policy but for their right to compensation for expropriated land. Yet, other instances might occur where the loss of residential land will induce displacement such as the severing of a relationship between a family and their land (*e.g.* cemetery) or adverse affects upon utility of their residential structure even though the structure itself was not expropriated. Although less common, it is unacceptable to define these persons as ineligible for the involuntary resettlement protections.

Recommended Edit:

“The Policy covers physical displacements (relocation **loss of residential land** or loss of shelter), ~~and~~ economic displacements (loss of assets, access to assets, or income sources or means of livelihoods) **and cultural dislocation** as a result of (i) acquisition of land, (ii) **changes in land use or access to land**, (iii) ~~involuntary~~ restriction on land use or access to **natural resources including** legally designated parks and protected areas, **and (iv) changes in environment leading to health concerns**. It covers them whether such losses and ~~involuntary~~ restrictions are full or partial, and permanent or temporary.”

4. *Failure to specify scope of application to ADB operations*

The scope fails to state the scope of ADB operations to which it applies. Aspects of its application to ADB actions are apparent on a piecemeal throughout the policy. This inhibits ease of use and implementation, and cumulatively appears to be a narrower range of activities than covered by the existing policy.

Recommended Edit:

“The Policy covers physical displacements (relocation **loss of residential land** or loss of shelter), ~~and~~ economic displacements (loss of assets, access to assets, or income sources or means of livelihoods) **and cultural dislocation** as a result of (i) acquisition of land, (ii) **changes in land use or access to land**, (iii) ~~involuntary~~ restriction on land use or access to **natural resources including** legally designated parks and protected areas, **and (iv) changes in environment leading to health concerns**. It covers them whether such losses and ~~involuntary~~ restrictions are full or partial, and permanent or temporary.”

**“The policy applies to all projects and covers all project components whether financed by ADB, co-financiers, financial intermediaries or borrowers, both public and private sector.”**

C. Principle 1

“Screen the project early to identify its past, present and future involuntary resettlement impacts and risks. Determine the scope of resettlement planning through survey/census of the affected persons, including a gender analysis, specifically related to resettlement impacts and risks.”

1. *Denial of responsibility for unmitigated past displacements*

The Consultation Draft recognized the need for the ADB to take “corrective action for unmitigated past displacements, if such displacements are directly linked to the project.”<sup>35</sup> The deletion of this language denies economic and social justice to families who have been negatively affected and possibly impoverished from past ADB actions. This not only contrary to the purpose and function of the ADB and human rights law, but is also contrary to basic conceptions of responsibility.

Recommended Edit: Integrate language from the 2007 Consultative Draft

“Screen the project early to identify its past, present and future involuntary resettlement impacts and risks. Determine the scope of resettlement planning, **which includes corrective action for unmitigated past displacements if such displacements are directly linked to the project**, through survey/census of the affected persons, including a gender analysis, specifically related to resettlement impacts and risks.”

2. *Explicitly integrate recognition the threat involuntary displacement is to the human rights of the displaced population.*

As an international body, the ADB should affirm and respond to international human rights law. The Second Draft’s failure to integrate the language indicates false degree of liberty regarding those norms. As an international legal entity, it is “bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties.”<sup>36</sup> Future revisions of the Second Draft must ensure that the entirety of the safeguard policy not only recognizes the ADB’s human rights obligations but integrates the content and language used within General Comments 4 and 7 in regards to involuntary resettlement. Specifically, the Second Draft should recognize that “instances of forced evictions are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law,” and “[e]very effort should be made, at each phase of a development project, to ensure that the rights contained in the Covenant are duly taken into account.”<sup>37</sup>

Recommended Edit: Integrate language from the 2007 Consultative Draft

“**In recognition that involuntary resettlement is a *prima facie* human rights violation and every effort should be made, at each phase of a development project, to ensure that the human rights of the affected population are duly taken into account, each project must be screened** ~~screen the project~~ early to identify its past, present and future involuntary resettlement impacts and risks. Determine the scope of resettlement planning, **which includes corrective action for unmitigated past displacements if such displacements are directly linked to the project**, through survey/census of the affected persons, including a gender analysis, specifically related to resettlement impacts and risks.”

3. *Explicitly integrate recognition of the risks of impoverishment associated with involuntary displacement.*

Equally striking as the lack of recognition of involuntary resettlement as a *prima facie* human rights violation is the Second Draft refusal to recognize the risks of impoverishment associated with involuntary displacement. This silence is a regression from the

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<sup>35</sup> Consultation Draft *supra* note 13 at Objectives, Scope and Policy Principles on the Involuntary Resettlement Safeguards, Principle 1.

<sup>36</sup> ICJ WHO Opinion *supra* note 2.

<sup>37</sup> General Comment 7 *supra* note 3 at ¶ 18 quoting General Comment 2 *supra* note 3 at ¶¶ 6 & 8(d).

Consultation Draft and a retreat from harmonization with peer-institutions;<sup>38</sup> all of ADB's peer institutions open their policies with an explicit statement of the unique risks associated with involuntary resettlement. More importantly, it is a failure to focus the policy upon displacement's impacts on people rather than the act of displacement itself. The consequence is a prioritization of property-compensation over individual rehabilitation, which is often the top priority of affected families. An expressed understanding that displacement must be avoided not because it is an unjust taking that requires compensation, but it must be avoided because of its impacts on people is essential to effective protection of the affected population's human rights.

Re-framing the policy in terms of impoverishment-prevention is more than mere words, but would provide a standard for evaluating the appropriateness of certain measures (*e.g.* cash vs. land-based compensation strategies). This will facilitate decision-making and dialogs between divergent stakeholders, particularly with affected populations and their advocates. As such, it increases the likelihood of multi-stakeholder investment into the resettlement plan and decreases the risks of opposition and resistance to the project because the affected people, rather than their belongings, are the focus of the policy

Recommended Edit: Integrate language from the 2007 Consultative Draft

**"In recognition of the risks of impoverishment associated with involuntary displacement and that involuntary resettlement is a *prima facie* human rights violation and every effort should be made, at each phase of a development project, to ensure that the human rights of the affected population are duly taken into account, each project must be screened ~~screen the~~ project early to identify its past, present and future involuntary resettlement impacts and risks. Determine the scope of resettlement planning, which includes corrective action for unmitigated past displacements if such displacements are directly linked to the project, through survey/census of the affected persons, including a gender analysis, specifically related to resettlement impacts and risks."**

D. Principle 2

"Carry out free, prior, informed consultations with all affected persons, host communities and concerned NGOs. Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation of resettlement programs. ... Where involuntary resettlement impacts and risks are highly complex and sensitive, compensation and resettlement decisions should be preceded by a 'social preparation' phase."

1. *Fails to integrate substance and language from international human rights law on involuntary resettlement*

Principle 2 fails to harmonize the safeguard policy with the international human rights norms that are binding on both the ADB as an institution and all member states.<sup>39</sup> In particular, General Comments 4 and 7 to the ICESCR specifically recognize the need for a "genuine consultation" to ensure respect for the affected population's human rights.<sup>40</sup> The Second Draft, in contrast, used language that is inappropriately co-opted from the U.N. Declaration on the Rights of Indigenous Peoples, but fails to have the same practical effect,

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<sup>38</sup> Consultation Draft *supra* note 13 at Attachment B: Safeguard Requirements for Borrowers/clients – Involuntary Resettlement, ¶1; *See e.g.* WB OP 4.12 *supra* note 10 at ¶ 1.

<sup>39</sup> General Comment 7 *supra* note 3 at ¶ 18.

<sup>40</sup> General Comment 7 *supra* note 3 at ¶ 15; General Comment 4 *supra* note 3 at ¶¶ 8(a) & 12.

with the term “free, prior, informed consultations.”<sup>41</sup> This term has no basis in international law, nor is it the terminology advocated by indigenous and other networks of resettled or at-risk communities, and therefore is not appropriate.

Recommended Edit:

“Carry out ~~free, prior, informed~~ **genuine** consultations with all affected persons, host communities and concerned NGOs. Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation of resettlement programs. Pay particular attention to the needs of vulnerable groups, especially of those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. Establish a grievance redress mechanism to receive and facilitate resolution of the affected persons’ concerns. Support social and cultural institutions of affected persons and their host population. Where involuntary resettlement impacts and risks are highly complex and sensitive, compensation and resettlement decisions should be preceded by a ‘social preparation’ phase.”

2. *Fails to obligate achieving meaningful result from consultations*

The ADB OED 2006 Study on Involuntary Resettlement found “relatively weak performance on public consultations and disclosure” and also concluded that “[n]o clear guidance is given about the level of public consultation required.”<sup>42</sup> The past decade of experience has shown that the adoption of a human rights-based approach towards consultation would mitigate these notable deficiencies, in part because a rights-based approach requires mechanisms that hold duty-bearers accountable to exercise their obligations.<sup>43</sup>

This entails specific duties for how the obligation is fulfilled (obligation of conduct) and the effects the fulfillment of the obligation has upon the rights holders (obligation of results).<sup>44</sup> This mirrors the accepted best practices within other multilateral development banks and the recommendations of the ADB’s Operations Evaluation Department.<sup>45</sup> Some basic minimum standards that should be any forthcoming revisions include: necessary conditions include freedom from coercion, assured independence in community decision-making, culturally acceptable procedures, adequate time and information for symmetric dialog, verifiable outcomes that include both the population at large and marginalized groups, and an ongoing relationship of information exchange with affected communities.<sup>46</sup>

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<sup>41</sup> UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples, adopted by the General Assembly, 2 October 2007 U.N. Doc. A/RES/61/295.

<sup>42</sup> ADB Operations Evaluation Department, Special Evaluation Study on Involuntary Safeguard Requirements, September 2006 pp. 11 & 24 [hereinafter: ADB OED Study].

<sup>43</sup> See generally Office of the United Nations High Commissioner for Human Rights, FREQUENTLY ASKED QUESTIONS ON A HUMAN RIGHTS-BASED APPROACH TO DEVELOPMENT COOPERATION, U.N. Doc HR/Pub/06/8, 2006 [hereinafter: UNOHCHR FAQ].

<sup>44</sup> See generally *Id.*

<sup>45</sup> ADB OED Study *supra* note 42 at pp. 54, 62 & 149; See also ADB, COMPENSATION AND VALUATION IN RESETTLEMENT: CAMBODIA, PEOPLE’S REPUBLIC OF CHINA, AND INDIA, 2007, (strongly recommending increased participation in developing compensation and rehabilitation packages); International Finance Corporation, Policy on Social and Environmental Sustainability, 30 April 2006 [hereinafter: IFC PSES], ¶20; WB OP 4.12 *supra* note 10 at ¶ 19 (“The borrower informs potentially displaced persons at an early stage about the resettlement aspects of the project and takes their views into account in project design.”).

<sup>46</sup> See e.g. UNOHCHR FAQ *supra* note 43; IFC PSES *supra* note 45 (having obligations of conduct and results); World Bank, Operational Policy, OP 4.12, December 2001 (same); European Bank for

Without these obligations, the risk is great that consultations will be treated as mere information dissemination mechanisms because there is no need for the borrower/client to engage – or even listen to – the affected population. Conversely, when projects are conceived and designed in response to local and regional development needs that treats involuntary resettlement as a development project that aims to improve the standard of living and livelihoods of the affected population, agreement should not be difficult to obtain. (See section E for further discussion).

This reliably will minimize the risk that the affected population and civil society organizations will resist the project as undemocratic, uninformed, and/or unjust.

Recommended Edit:

**“~~Carry~~ Agreement must be reached with all affected persons and host communities through carrying out free, prior, informed genuine consultations with all affected persons, host communities and concerned NGOs. Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation of resettlement programs. Pay particular attention to the needs of vulnerable groups, especially of those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. Establish a grievance redress mechanism to receive and facilitate resolution of the affected persons’ concerns. Support social and cultural institutions of affected persons and their host population. Where involuntary resettlement impacts and risks are highly complex and sensitive, compensation and resettlement decisions should be preceded by a ‘social preparation’ phase.”**

Recommended Edit: Glossary

**“Genuine Consultation: A coercion-free consultation process that achieves the following outcomes: 1) adherence to procedures jointly developed and agreed-upon between the affected population and the borrower/client, 2) the timely dissemination of all relevant information in a culturally appropriate and accessible fashion, 3) the verifiable agreement of the affected population of the consultations result, 4) the verifiable agreement within each relevant vulnerable group within the affected population of the result, and 5) an ongoing relationship with the affected community.”**

Recommended Edit: Glossary

**“Agreement: A collective agreement by affected communities through an independent and self-determined decision making process.”**

3. *Omission: no mandatory consultation on project alternatives and design.*

The Second Draft requires consultations upon the resettlement plan, but consultations on project designs and alternatives are not mandatory.<sup>47</sup> The omission of mandatory consultations on project alternatives and alternative project designs is a regression from the accepted standard by the International Finance Corporation, World Bank, Inter-American Development Bank, the African Development Bank, and the 2007 Consultation

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Reconstruction and Development, Environmental Social Policy, 2008 (repeatedly requiring ongoing relationship with affected community).

<sup>47</sup> Second Draft *supra* note 7 at ¶¶11, 12, 23 & 26.

Draft.<sup>48</sup> It is also a regression from the ADB's own standards and internal recommendations for best practices.<sup>49</sup>

The omission also undermines one of the primary protections against unnecessary forced displacement within Article 11 of ICESCR; namely, that all state parties have an obligation to “ensure, prior to carrying out any evictions, and particularly those involving large groups, that all feasible alternatives are explored in consultation with the affected persons, with a view to avoiding, or at least minimizing, the need to use force.”<sup>50</sup> For these reasons, it must be considered a dilution of the current protections and a regressive measure towards the establishment of human rights norms.

Recommended Edit:

**“~~Carry~~ Agreement must be reached with all affected persons and host communities through carrying out free, prior, informed genuine consultations with all affected persons, host communities and concerned NGOs at all points within the project cycle including evaluation and appraisal of project options and alternative project designs, and livelihood improvement measures.** Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation. Pay particular attention to the needs of vulnerable groups, especially of those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. Establish a grievance redress mechanism to receive and facilitate resolution of the affected persons’ concerns. Support social and cultural institutions of affected persons and their host population. Where involuntary resettlement impacts and risks are highly complex and sensitive, compensation and resettlement decisions should be preceded by a ‘social preparation’ phase.”

#### 4. Vague term: “complex and sensitive”

The term “complex and sensitive” is not predicated on objectively verifiable standards, and therefore creates an unacceptable degree of ambiguity as to when the greater protections

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<sup>48</sup> See e.g. African Development Bank, *Handbook on Stakeholder Consultation and Participation in ADB Operations*, 2001; IFC PSES *supra* note 45 at ¶20 (requiring consultations resulting in broad community support for the project before the project is submitted to management for approval); WB OP 4.12 *supra* note 10 at Annex A ¶ 19 (“The borrower informs potentially displaced persons at an early stage about the resettlement aspects of the project and takes their views into account in project design.”); IADB SOP *supra* note 27.

<sup>49</sup> See ADB, COMPENSATION AND VALUATION IN RESETTLEMENT: CAMBODIA, PEOPLE’S REPUBLIC OF CHINA, AND INDIA, 2007, pp. 13 & 14. ADB F2/OP *supra* note 34 at ¶ 3 (“Wherever screening procedures identify likely involuntary resettlement, the policy requires efforts to avoid or minimize such effects through review of feasible alternative project design and location options. The reviews allow evaluation of risks, alternatives, and tradeoffs, and open the way for development opportunities with early stakeholder involvement, including affected people and their representatives, local government, civil society groups, and others.”); See also ADB Public Communication Policy, March 2005. ¶ 24 *citing* Fowler, Alan. 2001. *Enhancing Participation in Country Strategy and Program Planning*. Manila. ADB (“Experience has also shown that projects generate complaints from local constituencies when insufficient information is made available during project design and implementation and when information is not made available early enough.”).

<sup>50</sup> General Comment 7 *supra* note 3 at ¶ 9. Please note that the use of the word “force” at the end of the quote is in reference to the term “forced eviction” which is defined as “the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.”

associated with the designation will be utilized. The glossary defines the term as “projects deemed by the ADB to be highly risky, or contentious or involve serious and multi-dimensional and generally inter-related potential social and/or environmental impacts.”<sup>51</sup> This introduces an excessive degree of subjectivity by any measure.

The current Operations Manual uses of the term “significant” as an analogous signifier for heightened protections and properly integrates objectively verifiable indicators, which ensure greater predictability and consistency in application.<sup>52</sup> Moreover, debates over its utilization are easily resolved through independent investigation. In comparison, the term “complex and sensitive” is overly ambiguous in specifying when heightened protections shall be triggered, and therefore must be viewed as a weakening of protections.

Recommended Edit: Eliminate term “complex and sensitive” and re-adopt “significant” standard:

**“Carry Agreement must be reached with all affected persons and host communities through carrying out free, prior, informed genuine consultations with all affected persons, host communities and concerned NGOs at all points within the project cycle including evaluation and appraisal of project options and alternative project designs, and livelihood improvement measures. Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation. Pay particular attention to the needs of vulnerable groups, especially of those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. Establish a grievance redress mechanism to receive and facilitate resolution of the affected persons’ concerns. Support social and cultural institutions of affected persons and their host population. Where involuntary resettlement impacts and risks are highly complex and sensitive significant, compensation and resettlement decisions should be preceded by a ‘social preparation’ phase.”**

Recommended Edit: Glossary: Significant: Retain current definition

**“A project is significant if either one of the following three conditions exist:**

- 1) 200 people or more will experience resettlement effects;**
- 2) 100 people or more who are experiencing resettlement effects are indigenous people or vulnerable as defined in the policy (for example, female-headed households, the poorest, isolated communities, including those without legal title to assets, and pastoralists); or**
- 3) more than 50 people experiencing resettlement effects are particularly vulnerable, for example, hunter-gatherers. The Projects Department concerned would decide, in consultation with the Social Development Division (SOCD), if a full RP is required.”**

*5. The “complex and sensitive” protections need to be integrated into any project that requires involuntary resettlement.*

Finding a project to be “complex and sensitive” triggers two requirements: a social preparation phase and a duty to establish independent advisory panels.<sup>53</sup> The social preparation phase is series of consultations with affected persons undertaken prior to any resettlement decisions “to build their capacity to deal with resettlement.”<sup>54</sup> The Second Draft does not provide any meaningful metrics for evaluating “their capacity to deal with

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<sup>51</sup> Second Draft *supra* note 7 at Glossary.

<sup>52</sup> ADB F2/OP *supra* note 34 at ¶ 19; ADB Handbook *supra* note 57 at p. 11.

<sup>53</sup> Second Draft *supra* note 7 at ¶ 22.

<sup>54</sup> *Id.* at Glossary.

resettlement,” which creates a high degree of ambiguity in terms of upon what standard this determination will be made.

The capacity building element also raises another concern, namely, if a community of affected people lacks the capacity to “deal with resettlement,” then they should not be resettled until said capacity is developed. The Second Draft, however, does not require this, but merely necessitates a series of consultations. While it is a step forward that the ADB recognizes that some communities require intensive capacity building prior to relocation to prevent further impoverishment, mere recognition is inadequate. A social preparation phase should be initiated after an evaluation of the community’s capacity for relocation as part of an ISA, and the phase should conclude when the gaps in capacity identified in the evaluation have been ameliorated.<sup>55</sup>

The second effect, triggering the use of an independent advisory panel during project preparation, should apply to each project with significant resettlement impacts (as defined above).<sup>56</sup> The mandate and powers of any independent advisory panel must be increased beyond what the Second Draft specifies, as the proposed language is a significant dilution from the practices recommended in the 1998 Handbook on Resettlement.<sup>57</sup> Notably absent are the following tasks:

- verify results of internal monitoring;
- assess whether resettlement objectives have been met; specifically, whether livelihoods and living standards have been restored or enhanced;
- assess resettlement efficiency, effectiveness, impact and sustainability, drawing lessons as a guide to future resettlement policy making and planning; and ascertain whether the resettlement entitlements were appropriate to meeting the objectives, and whether the objectives were suited to AP conditions.<sup>58</sup>

Furthermore, it is unclear who would be upon the panel, how they would be selected, and what role affected communities would have, if any, in their selection. These gaps in selection, mandate and powers must be addressed in future drafts.

Recommended Edit: Require evaluation of necessity of social preparation phase

**“Carry Agreement must be reached with all affected persons and host communities through carrying out free, prior, informed genuine consultations with all affected persons, host communities and concerned NGOs at all points within the project cycle including evaluation and appraisal of project options and alternative project designs, and livelihood improvement measures. Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation. Conduct an ISA to determine the necessity for a social preparation phase, and if one is found necessary by an independent expert, then initiate a social preparation phase to address any identified gaps in capacity. Pay particular attention to the needs of vulnerable groups, especially of those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. Establish a grievance redress mechanism to receive and facilitate resolution of the affected persons’**

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<sup>55</sup> 1995 Policy *supra* note 14 at ¶ 37.

<sup>56</sup> ADB F2/OP *supra* note 34 at ¶ 49 (not requiring an external monitor for projects involving significant resettlement, but explicitly expressing a preference for such reports).

<sup>57</sup> ADB, Handbook on Resettlement: A Guide to Good Practice, 1998, p. 78 [hereinafter: ADB Handbook].

<sup>58</sup> *Id.*

concerns. Support social and cultural institutions of affected persons and their host population. Where involuntary resettlement impacts and risks are ~~highly complex and sensitive~~ **significant**, compensation and resettlement decisions should be preceded by a 'social preparation' phase."

Recommended Edit: Have independent monitoring of consultation

"Carry out ~~free, prior, informed~~ **genuine** consultations with all affected persons, host communities and concerned NGOs **at all points within the project cycle including evaluation and appraisal of project options and alternative project designs, and livelihood improvement measures**. Inform all affected persons of their entitlements and resettlement options. Ensure their participation in planning, implementation, and monitoring and evaluation. **Conduct an ISA to determine the necessity for a social preparation phase, and if one is found necessary by an independent expert, then initiate a social preparation phase to address any identified gaps in capacity**. Pay particular attention to the needs of vulnerable groups, especially of those below the poverty line, the landless, the elderly, women and children, Indigenous Peoples, and those without legal title to land, and ensure their participation in consultations. Establish a grievance redress mechanism to receive and facilitate resolution of the affected persons' concerns. Support social and cultural institutions of affected persons and their host population. Where involuntary resettlement impacts and risks are ~~highly complex and sensitive~~ **significant**, ~~compensation and resettlement decisions should be preceded by a 'social preparation' phase~~ **consultation, participation and project implementation will be monitored by an independent advisory panel.**"

Recommended Edit: SR 2 – Involuntary Resettlement: Retain current mandate for external monitors

"28. The borrower/client will monitor the progress of implementing the RP. In addition to recording the resettlement information, the borrower/client will use resettlement audits, where relevant, to verify whether the implementation of the RP has produced the desired outcomes. For projects with significant involuntary resettlement impacts, the borrower/client will retain qualified and experienced external expert(s) or qualified NGOs to verify monitoring information of the borrower/client. The external experts engaged by the borrower/client will advise on safeguard compliance issues, **verify results of internal monitoring, assess whether resettlement objectives have been met; specifically, whether livelihoods and living standards have been restored or enhanced, assess resettlement efficiency, effectiveness, impact and sustainability, drawing lessons as a guide to future resettlement policy making and planning, and ascertain whether the resettlement entitlements were appropriate to meeting the objectives, and whether the objectives were suited to AP conditions**. If any significant IR issues are found, an addendum to the approved RP will be prepared to address such issues. Until such planning documents are formulated, disclosed, and approved, the borrower/ client will not proceed with implementing the specific project components, where IR impacts are identified."

#### E. Principle 3

"Improve, or at least restore, livelihoods of all affected households through (a) land-based resettlement strategies when affected livelihoods are land-based where feasible, or cash compensation at replacement value for land when the loss of land does not undermine livelihoods; (b) prompt replacement of assets and access to assets of equal or higher value; (c) prompt compensation at full replacement cost for assets that can not be restored, and (d) where feasible, additional revenues and services through project benefit sharing schemes."

##### 1. *Improve vs. Restore*

A strong consensus has developed among social scientists, economists, implementing agencies and NGOs on the need for development institutions to abandon their focus on

restoration of incomes, and commit instead to requiring livelihoods improvement for all project-affected people.<sup>59</sup> By adopting a restoration-goal, the Second Draft fails to understand displacement and ADB projects as an opportunity for the development of both physical infrastructure and the socioeconomic conditions of the affected community.<sup>60</sup> Consequently, ADB is framing project-induced displacement only in terms of the do-no-harm perspective that has persistently resulted in interventions that cause further impoverishment of the affected population.<sup>61</sup>

#### Recommended Edit:

~~“Improve, or at least restore,~~ livelihoods of all affected households through (a) land-based resettlement strategies when affected livelihoods are land-based where feasible, or cash compensation at replacement value for land when the loss of land does not undermine livelihoods; (b) prompt replacement of assets and access to assets of equal or higher value; (c) prompt compensation at full replacement cost for assets that can not be restored, and (d) where feasible, additional revenues and services through project benefit sharing schemes.”

### 2. *Benefit sharing*

ADB project-induced displacement is often justified by the benefits stemming from the project, such as improved infrastructure or decreased electricity costs, which are publicly accessible. This perspective, while accurate, is incomplete insofar as it fails to acknowledge the differential capacities to access any public benefits of the project that are predicated on both socioeconomic class and even geography. Dams, for example, often produce electricity that primarily benefits wealthy communities that have greater demand for and access to electricity than the displaced population. This often holds true even if the displaced community has been compensated to restoration levels on their tangible losses (or even on the rough estimates for their intangible ones).<sup>62</sup> This is because displacement decapitalizes communities of physical as well as social capacity, which in turns undermines their ability to access, demand and benefit from the electricity generated.<sup>63</sup>

This “benefit-gap” raises an additional set of ethical considerations pertaining to the development project that can be best addressed through applying a broad understanding of benefit-sharing requirements. The benefits that should accrue to any displaced community should be an increased capacity to access, demand and utilize any public good stemming from an ADB financed project. This extends beyond revenue-sharing mechanisms, which should be mandatory for ventures in which private entities profit from expropriated land or when governments receive revenue from the project (*e.g.* licensing fees or royalties for extractive industries).<sup>64</sup>

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<sup>59</sup> See *e.g.* World Commission on Dams, *Dams and Development: A New Framework for Decision-Making*, 2000, pp. 99; See also Cernea & Mathur *supra* note 5.

<sup>60</sup> See Susan D. Tamondong, *Can Improved Resettlement Reduce Poverty?*, in Cernea & Mathur *supra* note 5.

<sup>61</sup> Cernea & Mathur *supra* note 5.

<sup>62</sup> Michael M. Cernea, *For a New Economics of Resettlement: A Sociological Critique of the Compensation Principle*, *International Journal of Social Science* Vol. 55 No. 175, 2003, pp 37 - 45.

<sup>63</sup> *Id.*

<sup>64</sup> Profit-neutral instances can also create severe benefit-gaps that need to be mitigated, such as road expansions or waste-water treatment plants that create further direct benefits for heavy users at the cost to the displaced population.

As such, the ADB has an ethical obligation to ensure the local development of displaced populations, according to agreed-upon development measures reached through genuine consultation with affected persons. This development should not be mere fiscal investment, but rather targeted accessibility and socioeconomic opportunity-expansion mechanisms such as increased adult and child educational opportunities and health care availability. Where possible, these benefits should be funded by revenue sharing opportunities as a return on the capital investment the displaced population made in the project itself.<sup>65</sup> Such an approach would increase the likelihood of ADB's compliance with its own obligations under the safeguard policies, and it also would meet the ADB's obligations on the Rio Declaration on the Environment and Development as well as their duty under Article 2 of the ICESCR to progressively realize an adequate standard of living for all persons.<sup>66</sup>

Recommended Edit:

**"In accordance with agreed-upon measures developed through genuine consultation with affected persons, improve, or at least restore, livelihoods of all affected households through (a) land-based resettlement strategies when affected livelihoods are land-based where feasible, or cash compensation at replacement value for land when the loss of land does not undermine livelihoods; (b) prompt replacement of assets and access to assets of equal or higher value; (c) prompt compensation at full replacement cost for assets that can not be restored, and (d) where feasible, Additional revenues and services through project benefit sharing schemes shall be part of all compensation packages except in exceptional circumstances which will be publicly demonstrated and documented."**

3. *Dilution: preference for land-based resettlement strategies to "land-based or cash compensation"*

The extensive body of research on involuntary resettlement compensation strategies and outcomes all point to the importance of providing replacement land and land-based compensation measures for affected people who have land-based livelihoods.<sup>67</sup> Analogously, the other pertinent finding has been that the provision of cash-compensation as a means to restore livelihoods frequently failures to prevent further impoverishment.<sup>68</sup> The ADB should harmonize their policies with the past decade of empirical research, as the World Bank has done, and explicitly state a preference for land-based solutions for displaced people with land-based livelihoods.<sup>69</sup> Land-based income rehabilitation mechanisms should be viewed as complimentary to, rather than interchangeable with, the benefit-sharing strategies discussed above.

Recommended Edit:

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<sup>65</sup> Cerna *supra* note 62.

<sup>66</sup> ICESCR *supra* note 3; *Report of the United Nations Conference on Environment and Development* (Rio de Janeiro, 3-14 June 1992) UN Doc. A/CONF.151/26 (vol. I), Annex 1: Rio Declaration on Environment and Development.

<sup>67</sup> Cerna *supra* note 62. The same holds true for aquatic-based livelihoods and access to of fresh/marine water. *See e.g.* Nam Theun 2 Project, *Mitigation, Resettlement and Livelihood Restoration*, Vol. 3 Ch. 8, March 2005 available at [http://www.namtheun2.com/gallery/lib\\_sdp.htm#vol1](http://www.namtheun2.com/gallery/lib_sdp.htm#vol1).

<sup>68</sup> Ruwani Jayewardene, *Can Displacement Be Turned into Development by Compensation Alone?: The South Asian Experience* in Cerna & Mathur *supra* note 5.

<sup>69</sup> WB OP 4.12 *supra* note 10 at ¶ 11 ("Preference should be given to land-based resettlement strategies for displaced persons whose livelihoods are land-based. ... The lack of adequate land must be demonstrated and documented to the satisfaction of the Bank.").

**“In accordance with agreed-upon measures developed through meaningful consultation with affected persons, improve, or at least restore, livelihoods of all affected households through ~~(a)~~ land-based resettlement strategies that permit the re-establishment of their former livelihood when affected livelihoods are land-based. where feasible, or, in exceptional circumstances, affected people may make a free and informed choice to accept cash compensation at replacement value for land when the loss of land does not undermine livelihoods. ~~(b)~~ All lost assets shall be ~~prompt~~ promptly replacement of replaced by assets and access to assets of equal or higher value,; ~~(c)~~ and prompt compensation at full replacement cost for assets that can not be restored., and ~~(d)~~ Additional revenues and services through project benefit sharing schemes shall be part of all compensation packages except in exceptional circumstances which will be publicly demonstrated and documented.”**

4. *Dilution: “economic and social future” to “improve livelihoods.”*

The Second Draft proposes language that dilutes the existing standard from including the affected individual’s “economic and social future” to merely restore or improve their “livelihoods.”<sup>70</sup> The difference between the two is greater than mere semantics. Improving a socioeconomic future means more than merely increasing earning capacity, but also integrates opportunities for different career paths, educational opportunities for adults and children, and providing channels for underprivileged voices to engage the public sphere. This language shift is a withdrawal from a pro-local development approach that compliments the benefit-sharing and land-based strategies discussed above.

Recommended Edit:

**“In accordance with agreed-upon measures developed through genuine consultation with affected persons, improve, or at least restore, livelihoods and economic and social future of all affected households through ~~(a)~~ land-based resettlement strategies that permit the re-establishment of their former livelihood when affected livelihoods are land-based. where feasible, or, in exceptional circumstances, affected people may make a free and informed choice to accept cash compensation at replacement value for land when the loss of land does not undermine livelihoods. ~~(b)~~ All lost assets shall be ~~prompt~~ promptly replacement of replaced by assets and access to assets of equal or higher value,; ~~(c)~~ and prompt compensation at full replacement cost for assets that can not be restored., and ~~(d)~~ Additional revenues and services through project benefit sharing schemes shall be part of all compensation packages except in exceptional circumstances which will be publicly demonstrated and documented.”**

5. *Omission: timing on delivery of livelihood rehabilitation*

The 1995 Policy required that affected families should “be provided with sufficient resources and opportunities to reestablish their homes and livelihoods as soon as possible.”<sup>71</sup> This has been omitted for unclear reasons. Failure to recognize the borrower/client’s obligation to act urgently to mitigate the risks of impoverishment creates space for a continuation of the delays in implementing social protections that have unjustifiably marred ADB financed projects.<sup>72</sup> Future iterations of the safeguards must include this language.

Recommended Edit:

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<sup>70</sup> 1995 Policy *supra* note 14 at ¶ 34 (iii).

<sup>71</sup> *Id.* ¶ 34 (iv).

<sup>72</sup> The NGO Forum on Cambodia & Resettlement Action Network, *Report on Field Survey of the Resettlement Impacts caused by National Highway 1 Improvement Project*, February 2008.

**“In accordance with agreed-upon measures developed through meaningful consultation with affected persons, improve, or at least restore, livelihoods and economic and social future of all affected households as soon as possible through (a) land-based resettlement strategies that permit the re-establishment of their former livelihood when affected livelihoods are land-based. where feasible, or, in exceptional circumstances, affected people may make a free and informed choice to accept cash compensation at replacement value for land when the loss of land does not undermine livelihoods. (b) All lost assets shall be promptly replaced or replaced by assets and access to assets of equal or higher value, (c) and prompt compensation at full replacement cost for assets that can not be restored, and (d) Additional revenues and services through project benefit sharing schemes shall be part of all compensation packages except in exceptional circumstances which will be publicly demonstrated and documented.”**

F. Principle 4

“Those affected by physical displacements will receive in addition (a) assistance to relocate, secure tenure of relocation land, better housing at resettlement sites with comparable access to employment and production opportunities, civic infrastructure and community services, as required; and (b) transitional support and development assistance, such as land development, credit facilities, training or employment opportunities. Integrate resettlers economically and socially into their host communities, and extend project benefits to host communities.”

1. *Dilution: Unnecessarily limited to physical displacement*

Principle 4 must be expanded to all persons affected by project activities. The limited scope of Principle 4 is a regression from the 1995 standard which treats physically, economically and culturally displaced individuals equally.<sup>73</sup> (see section B for further discussion).

Recommended Edit:

“Those affected by physical, **economic or cultural** displacements **from any project related activity** will receive in addition (a) assistance to relocate, secure tenure of relocation land, better housing at resettlement sites with comparable access to employment and production opportunities, civic infrastructure and community services, as required; and (b) transitional support and development assistance, such as land development, credit facilities, training or employment opportunities. Integrate resettlers economically and socially into their host communities, and extend project benefits to host communities.”

2. *Unnecessary discretionary element: as required*

Because all persons are entitled to tenure security and all affected individuals should benefit from the project, the term “as required” is superfluous.<sup>74</sup> Its inclusion adds a discretionary element to what should be a guiding principle for all projects, namely, the betterment of the lives of displaced families.

Recommended Edit:

“Those affected by physical, **economic or environmental** displacements **from any project related activity** will receive in addition (a) assistance to relocate, secure tenure of relocation land, better housing at resettlement sites with comparable access to employment and production opportunities, civic infrastructure and community services, ~~as required~~; and (b) transitional support and development assistance, such as land development, credit facilities, training or employment opportunities. Integrate resettlers economically and socially into their host communities, and extend project benefits to host communities.”

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<sup>73</sup> 1995 Policy *supra* note 14 at ¶ 34.

<sup>74</sup> General Comment 7 *supra* note 3 at ¶ 9.

### 3. *Integration of International Human Rights Law*

Principle 4 places a clear opportunity to integrate the language within General Comments 4 and 7 in terms of defining the types of homes to which displaced individuals have a right.<sup>75</sup> Under international human rights law, no person should be rendered homeless through involuntary resettlement and all displaced persons have a right to security of tenure and deserve transitional support and development assistance.<sup>76</sup> For the reasons expressed above (see section C.2), the Second Draft should explicitly include the General Comments' substantive content.

Recommended Edit:

"Those affected by physical, **economic or environmental** displacements **from any project related activity shall not be rendered homeless but rather** will receive ~~in addition (a)~~ assistance to relocate, secure tenure of relocation land, better housing at resettlement sites with comparable access to employment and production opportunities, civic infrastructure and community services. **All housing provided will be affordable, habitable, accessible, appropriate located for socioeconomic opportunities and culturally adequate,** ~~as required; a~~ ~~(b)~~ **They will also receive** transitional support and development assistance, such as land development, credit facilities, training or employment opportunities **and all essential appropriate procedural protections and due process rights.** ~~Integrate~~ **Resettlers will be** economically and socially **integrated** into their host communities, and ~~extend project benefits to~~ host communities **shall become project beneficiaries.**"

### G. Principle 5

"Improve the standards of living of the affected poor and other vulnerable groups at least to the national minimum standards. In rural areas provide them with legal and affordable access to land and resources, and in urban areas with appropriate income sources and legal and affordable access to adequate housing."

#### 1. *Vague term: "National minimum standards"*

The term "national minimum standards" is undefined, and the Second Draft does not specify which agency would be empowered to define the minimum standards. Rather than defining the term through the glossary, any forthcoming revisions should adopt a more participatory approach in which the standard of living improvement goals are developed through community consultations.<sup>77</sup>

Recommended Edit:

"Improve the standards of living of the affected poor and other vulnerable groups ~~at least to the national minimum standards~~ **to binding standard of living improvement goals developed in consultation with the affect population.** In rural areas provide them with legal and affordable access to land and resources, and in urban areas with appropriate income sources and legal and affordable access to adequate housing."

### 2. *Integration of International Human Rights Law*

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<sup>75</sup> *Id.*; General Comment 4.

<sup>76</sup> General Comment 7 *supra* note 3 at ¶ 16 ("Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.").

<sup>77</sup> See e.g. Nakayama, M., *Innovative resettlement schemes planned for the Numata Dam project*, Hydrological Processes, vol. 17 iss. 14, 2003, pp. 2727-2736.

Principle 5 admirably integrates some of the text from General Comments 4 and 7, but fails to integrate one of the most important elements of the right to adequate housing: security of tenure.<sup>78</sup> For the reasons expressed above (see section C.2), Principle 5 should explicitly include security of tenure.

Recommended Edit:

“Improve the standards of living of the affected poor and other vulnerable groups ~~at least to the national minimum standards~~ **to binding standard of living improvement goals developed in consultation with the affect population**. In rural areas provide them with legally secure and affordable access to land and resources, and in urban areas with appropriate income sources and **legally secure** and affordable access to adequate housing.”

#### H. Principle 6

“If land acquisition is through negotiated settlements, procedures will be developed in a transparent, consistent and equitable manner to ensure the persons who enter into negotiated settlements will maintain the same or better income and livelihood status.”

##### 1. *Omission: security for negotiated settlement*

Principle 6 only guarantees a process, but fails to require any meaningful result. As the Second Draft is currently worded, the only secured result is that “procedures will be developed in a transparent, consistent and equitable manner to ensure the persons who enter into negotiated settlements will maintain the same or better income and livelihood status.”<sup>79</sup> The obligation to *create procedures designed to achieve a certain* result is much weaker than the obligation to *produce the desired result*. It therefore fails to safeguard the affected population from the risks of with displacement because the affected population no longer has the same security of receiving the rehabilitation assistance they would have received if their land were expropriated. Without a guaranteed minimum result, the disparity in bargaining power between borrowers/clients and affected populations could easily lead to unjust rehabilitation assistance packages.<sup>80</sup> To mitigate the risks of asymmetrical bargain power, Principle 6 should explicitly provide a strengthened version of the guarantees within the current Operations Manual that guarantees improvement over restoration (see *supra* commentary to Objectives & Principle 3).<sup>81</sup>

Recommended Edit:

“If land acquisition is through negotiated settlements, **the affected persons shall receive economic and social benefits, including but not limited to the livelihood improvement, rehabilitation assistance, and transitional assistance at least equal to what they would have received if their land was expropriated**. All procedures will be developed in a transparent, consistent and equitable manner ~~to ensure the persons who enter into negotiated settlements will maintain the same or better income and livelihood status.~~”

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<sup>78</sup> General Comment 7 *supra* note 3 at ¶ 9; General Comment 4 *supra* note 3.

<sup>79</sup> ADB, Second Draft *supra* note 7 at IR Policy Principle 6.

<sup>80</sup> See e.g. ADB, Special Evaluation Study on the Policy Impact of Involuntary Resettlement, September 2000, ¶ 186 (recognizing the necessity for protections to account for the asymmetry of bargaining positions between affected populations and borrower/clients).

<sup>81</sup> ADB F2/OP *supra* note 34 at ¶ 13 (guarantees include the following: relocation and transfer expenses; assistance for transitional income and livelihood support; compensation for crop or business losses; reestablishment of agricultural or business production; assistance for income restoration; and assistance for restoring social services, social capital, community property, and resources.)

2. *Lack of participation in negotiation procedure development*

The affected population is not included on the negotiation procedure development process. This is a necessary step in order to ensure that the affected population is fluent with the rules of negotiation, the rules are culturally appropriate, and that the procedure itself is addresses the inherent asymmetry of power between expropriator and affected person.<sup>82</sup>

Recommended Edit:

**“If land acquisition is through negotiated settlements, the affected persons shall receive economic and social benefits, including but not limited to livelihood and income improvement and transition assistance, at least equal to what they would have received if they were involuntarily resettled. All procedures will be developed in a transparent, consistent and equitable manner to ensure the persons who enter into negotiated settlements will maintain the same or better income and livelihood status through a participatory process that ensures the affected population is fluent with the procedure and that the procedure is unbiased and culturally relevant.”**

I. Principle 7

“Displaced persons without titles to land or any recognizable legal rights to land are eligible for resettlement assistance, and compensation for loss of non-land assets.”

1. *Inadequate protection for non-physically displaced persons*

Principle 7 mandates that displaced people are eligible for resettlement assistance; however, Principle 7 fails to cover all persons displaced by project activities because the only physically displaced persons are eligible for “resettlement assistance.”<sup>83</sup> Because resettlement assistance is the only specific guarantee for persons to re-establish their homes, this means that all non-physically displaced persons without titles are ineligible for support to re-establish their homes. Instead, they will merely receive compensation for loss of non-land assets.<sup>84</sup>

This has the following unacceptable consequences:

- 1) an increase in the risk that displace persons without titles/legally recognizable land rights will be rendered homeless, be unable to obtain adequate security of tenure, and be unable to realize their right to adequate housing even if they previously were living in an adequate home.<sup>85</sup>
- 2) direct contravention of ADB’s stated obligation in Principle 5 to improve the standard of living of “vulnerable groups,” defined to include those people without

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<sup>82</sup> ADB, COMPENSATION AND VALUATION IN RESETTLEMENT: CAMBODIA, PEOPLE’S REPUBLIC OF CHINA, AND INDIA, 2007 p. 54 (recognizing the inherent asymmetry of bargaining power).

<sup>83</sup> The glossary defines “resettlement assistance” as “assistance provided to physically displaced persons and households by the project to re-establish their houses and other amenities such as schooling, transportation, social services, and income sources.” ADB, Second Draft *supra* note 7 at Glossary.

<sup>84</sup> ADB, Second Draft *supra* note 7 at Draft Safeguard Requirements for Borrowers/Clients 2 – Involuntary Resettlement, ¶¶ 4-8.

<sup>85</sup> ICESCR *supra* note 3; General Comment 4 *supra* note 3; General Comment 7 *supra* note 3 at ¶ 16 (“Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights.”).

legal title to land, considering compensation's long history of failing to elicit standard of living improvement;<sup>86</sup>

- 3) unambiguous regression from the current policy which covers all displaced people,<sup>87</sup>
- 4) de-harmonizes ADB policy with other public development banks;<sup>88</sup>
- 5) undermines the credibility of the ADB to maintain good-faith efforts towards developing a robust involuntary resettlement policy because an isolated reading to Principle 7 suggests its scope includes all displaced people and only upon review of the Glossary is its limited application apparent.

Recommended Edit: Glossary: Rehabilitation Assistance

"Relocation/Resettlement Assistance: Assistance provided to physically, **economically, and culturally** displaced persons and households by the project to re-establish their houses and other amenities such as schooling, transportation, social services, and income sources."

Recommended Edit: Integrate explicit protections for landless into Principle 7

"Displaced persons without titles to land or any recognizable legal rights to land **must not be made homeless through ADB project activities, in rural areas provide them with legally secure and affordable access to land and resources, in urban areas with appropriate income sources and legally secure and affordable access to adequate housing, and all landless affected persons** are eligible for resettlement assistance, and compensation for loss of non-land assets."

J. Principle 8

"Prepare a resettlement plan, or equivalent planning document(s), elaborating affected persons (*sic*) entitlements, the income and livelihood restoration strategy, institutional arrangement, monitoring and reporting framework, budget, and time-bound implementation schedule."

1. *Inadequate specificity required for the resettlement plan*

Neither Principle 8, nor the entirety of the Second Draft, adequately specifies the elements that must be within any resettlement plan. The most detailed set of requirements the Second Draft offers is Annex 1 to the Involuntary Resettlement Draft Safeguard Requirements, which is a dramatic dilution from the current standards.<sup>89</sup> In comparison to the World Bank Operating Policy 4.12 Annex A – Involuntary Resettlement Instruments and Section E of the ADB Operations Manual F2/OP, Annex 1 lacks detail and, more importantly, lack meaningful effect because Annex 1 is non-binding.<sup>90</sup> In contrast, Annex A to 4.12 requires the borrower/client to address all the elements within the Annex or to note the

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<sup>86</sup> See generally Cernea & Mathur *supra* note 5.

<sup>87</sup> 1995 Policy *supra* note 14 at ¶ 34; See also ADB F2/BP *supra* note 14 at ¶ 4.

<sup>88</sup> WB OP 4.12 *supra* note 10; IADB SOP *supra* note 27 at Section IV.6

<sup>89</sup> ADB F2/OP *supra* note 34 at ¶ 26; Second Draft *supra* note 7 at Draft Safeguard Requirements for Borrowers/Clients 2 – Involuntary Resettlement Annex 1.

<sup>90</sup> Please note that this is not an endorsement of the substance of the World Bank's Annex A to OP 4.12 or of the adequacy of the current standards, but rather to illustrate the inadequacy of the proposed requirements within the Second Draft. Until the ADB proposes a set of requirements that is analogous in terms of specificity and content to Annex A, the Safeguard Update will be considered unacceptable. See ADB F2/OP *supra* note 34 at ¶ 26; WB OP 4.12 *supra* note 10 at Annex A.

reason for the element's exclusion.<sup>91</sup> The dilution of requirements from the global norm can only be understood as a regressive measure.

Recommended Edit:

~~“Prepare a resettlement plan, or equivalent planning document(s), elaborating affected persons entitlements, the income and livelihood restoration strategy, institutional arrangement, monitoring and reporting framework, (i) organizational responsibilities; (ii) community participation and disclosure arrangements; (iii) the consultation process, (iv) evidence of verifiable agreement of the affected population, (v) project resettlement option analysis including a no-resettlement option, (vi) findings of the socioeconomic survey and social and gender analysis; (vii) legal framework, including eligibility criteria and an entitlement matrix; (viii) mechanisms for resolution of conflicts and appeals procedures; (ix) identification of alternative sites and selection; (x) inventory, valuation of, and compensation for, lost assets; (xi) landownership, tenure, acquisition, and transfer; (xii) access to training, employment, and credit; (xiii) shelter, infrastructure, and social services; (xiv) environmental protection and management; (xv) monitoring and evaluation; (xvi) a detailed cost estimate with budget provisions; and (xvii) an implementation schedule, showing how activities will be scheduled with time-bound actions in coordination with the civil works, (xviii) and a time-bound implementation schedule with a date by which livelihood restoration will be achieved.”~~

Recommended Edit: Insertion of binding annex analogous to World Bank OP 4.12, Annex A - Involuntary Resettlement Instrument that reflects the concerns raised within this document.

See World Bank OP 4.12, Annex A - Involuntary Resettlement Instrument

*2. Problematic incorporation of “or equivalent planning document(s)”*

The term “equivalent planning document(s)” is never defined within the Second Draft, and is effectively indefinable in a meaningful sense due to the Second Draft’s silence in detailing the necessary elements of a resettlement plan (see above). Even if the Second Draft provided a minimum set of elements to be within a resettlement plan as per World Bank OP4.12 Annex 1, it is unclear why the policy should recognize the need for anything other than a “resettlement plan.” The acceptance of alternative documents creates space for exemptions predicated on the basis that the equivalent document was, in fact, not a resettlement plan. While slim, this risk seems to come at no benefit to the affected persons, the ADB or to the borrowers/clients.

Recommended Edit

~~“Prepare a resettlement plan, or equivalent planning document(s), elaborating affected persons entitlements, the income and livelihood restoration strategy, institutional arrangement, monitoring and reporting framework, (i) organizational responsibilities; (ii) community participation and disclosure arrangements; (iii) the consultation process, (iv) evidence of verifiable agreement of the affected population, (v) project resettlement option analysis including a no-resettlement option, (vi) findings of the socioeconomic survey and social and gender analysis; (vii) legal framework, including eligibility criteria and an entitlement matrix; (viii) mechanisms for resolution of conflicts and appeals procedures; (ix)~~

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<sup>91</sup> WB OP 4.12 *supra* note 10 at Annex A ¶ 2 (“The resettlement plan covers the elements below, as relevant. When any element is not relevant to project circumstances, it should be noted in the resettlement plan.”). *See also* IADB SOP *supra* note 27 at Section V.6.

identification of alternative sites and selection; (x) inventory, valuation of, and compensation for, lost assets; (xi) landownership, tenure, acquisition, and transfer; (xii) access to training, employment, and credit; (xiii) shelter, infrastructure, and social services; (xiv) environmental protection and management; (xv) monitoring and evaluation; (xvi) a detailed cost estimate with budget provisions; and (xvii) an implementation schedule, showing how activities will be scheduled with time-bound actions in coordination with the civil works, (xviii) and a time-bound implementation schedule with a date by which livelihood restoration will be achieved.”

K. Principle 9

“Disclose draft resettlement plan, including documentation of the consultation process before the project appraisal and in a form, manner and language(s) accessible to affected persons and other stakeholders. The final resettlement plans and their updates will also be disclosed to the affected persons and other stakeholders.”

1. *Need to ensure timely disclosure*

Disclosure of information pertaining to resettlement plans must take place early and at each phase of the project cycle in order to ensure that affected communities and stakeholders are fully informed and able to effectively participate in project decision making. Disclosing an announcement of possible resettlement alternatives and actions prior to the development of a resettlement plan and during project scoping is necessary in order to alert and prepare potentially affected persons of the project timeline and process for development of a resettlement plan. Such disclosure should take place within the Public Information Document prepared for the project and disclosed “no later than 30 calendar days following approval of the concept paper for the project”.<sup>92</sup> Early disclosure also allows the project sponsor and ADB to receive initial input from potentially affected communities that can be incorporated into the first draft of a resettlement plan.

Furthermore, iterative disclosure of consecutive draft resettlement plans is critical to ensure that input on the document has been appropriately incorporated prior to project approval. Disclosure of a first draft resettlement plan before project appraisal allows for informed consultation on that document.<sup>93</sup> In addition, disclosure of an iterative draft in adequate time prior to approval is necessary so that the ADB can ensure that external comments and input were correctly understood and allows the bank the opportunity to state how it addressed input raised by stakeholders and affected persons.

Recommended Edit:

“Disclose ~~draft resettlement plan~~, **information announcing possible resettlement during project concept and disclose two iterative draft resettlement plans** including documentation of the consultation process before the project appraisal and **before project approval in adequate time and** in a form, manner and language(s) accessible to affected persons and other stakeholders. The final resettlement plans and ~~their~~ **at least one** updates will also be disclosed to the affected persons and other stakeholders.”

L. Principle 10

“Involuntary resettlement should be conceived and executed as part of a development project or program. The full costs of resettlement will be included in the presentation of the costs and

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<sup>92</sup> ADB, Public Communications Policy of the Asian Development Bank: Disclosure and Exchange of Information, March 2005 ¶ 70.

<sup>93</sup> *Id.* ¶¶ 80 & 82.

benefits of the project. For a project with significant involuntary resettlement impacts, consider implementing the involuntary resettlement component of the project as a stand alone operation.”

1. *Non-binding language*

Principle 10 encourages, but fails to require involuntary resettlement to be conceived and executed as part of a development project. The logic and reasoning for conceiving and executing resettlement as development project is well-founded, and the ADB is correct in recognizing its importance.<sup>94</sup> Mere recognition, however, is inadequate because it lacks binding-force and therefore permits the borrower/client to adopt the familiar and failed property-compensation approach towards displacement.

Recommended Edit:

“Involuntary resettlement ~~should~~ **must** be conceived and executed as part of a development project or program. The full costs of resettlement will be included in the presentation of the costs and benefits of the project. For a project with significant involuntary resettlement impacts, consider implementing the involuntary resettlement component of the project as a stand alone operation.”

M. Principle 11

“Pay compensation and provide other entitlements before physical or economic displacement. Implement the resettlement plan under close supervision throughout the project implementation.”

1. *Lack of guarantees for delivery of rehabilitation assistance*

The delivery of resettlement assistance and rehabilitation measures must be part of a time-bound action plan that is directly tied the awarding of contracts and disbursement of ADB funds. Without these provisions, the affected population is merely guaranteed compensation prior to displacement, which has been repeatedly proven to be unable to mitigate the risks of impoverishment.<sup>95</sup> Furthermore, studies show that affected people regularly experience massive delays and even complete failures to implement agreed-upon rehabilitation measures, when these measures are not required as prerequisites for moving ahead with major part of the project. Therefore, Principle 11 fails to guarantee that the necessary measures to prevent impoverishment will be initiated prior to displacement. The failure of the Second Draft to include these provisions is a missed opportunity for harmonization and a dilution from the 1995 Involuntary Resettlement Policy.<sup>96</sup>

Recommended Edit:

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<sup>94</sup> “Resettlement as a consequence of displacement can be positive – that is, be transformed into an opportunity for development, if it is treated as such from the outset. It is positive when deliberately seen and planned as an opportunity to improve the livelihood of those displaced by investing in their development, and not only by compensating their losses.” Susan D. Tamondong, *Can Improved Resettlement Reduce Poverty?*, in Cerna & Mathur *supra* note 5; *See also* Cerna *supra* note 62.

<sup>95</sup> Cerna *supra* note 62.

<sup>96</sup> 1995 Policy *supra* note 14 at ¶¶ 36, 38 & 40; *See also* ADB F2/OP *supra* note 34 at ¶ 36 (“The resettlement plan must also provide a time-bound action schedule for project activities such as acquisition of land to ensure that affected people are individually compensated and assisted before civil works contracts are awarded or similar milestone events occur.”); WB OP 4.12 *supra* note 10 at ¶ 10.

“Pay compensation and provide other entitlements before physical, ~~or~~ economic, **or cultural** displacement, **and ensure agreed-upon milestones for rehabilitation and improvement have been met, before allowing major disbursements or awarding of civil works.** Implement the resettlement plan under close supervision throughout the project implementation.”

N. Principle 12

“Monitor and assess resettlement outcomes, their impacts on the standards of living of the affected persons, and whether the objectives of the resettlement plan have been achieved by taking into account the baseline conditions and the results of resettlement monitoring.”

1. *Affirmation of the “do-no-harm” principle rather than resettlement as a development project*

Principle 12 creates a strong relationship between the objectives of a resettlement plan and “the baseline conditions,” which is roughly defined as “pre-project conditions.”<sup>97</sup> While a necessary component of assessing any resettlement plan’s implementation, pre-project conditions alone are an insufficient standard because they exclude any measurement of improvement of the affected population’s standard of living. Without the inclusion of additional language specifically requiring the use of livelihood improvement goals as a standard for any monitoring and assessment, the resettlement plan could be found “successfully implemented” in instances where the affected population did not benefit from the project. If adopted as is, Principle 12 will render the language seeking the livelihood improvement in Principle 3 and 5 effectively meaningless as there is no obligation to monitor said improvement.

Recommended Edit:

“Monitor and assess resettlement outcomes, their impacts on the livelihoods and standards of living of the affected persons, and whether the objectives of the resettlement plan have been achieved by taking into account the baseline conditions, **livelihood and standard of living goals in the resettlement plan, any benefit sharing agreements,** and the results of resettlement monitoring.”

2. *Inadequate specificity in supervisory and monitoring and evaluation obligations*

Principle 12, as most of the Second Draft, is silent on the ADB’s and borrower/clients supervisory duties despite the nebulous duty to “closely supervise” in Principle 11 (*e.g.* the model Outline of a Resettlement Plan fails to include supervision, reporting and monitoring and evaluation as aspects of the resettlement plan). This is a severe regression from the global standard and must be addressed in any forthcoming drafts.<sup>98</sup>

Recommended Edit:

“**Provide ongoing supervision of the resettlement plans development and implementation as well as ~~monitor~~** and assess resettlement outcomes, their impacts on the **livelihood and** standards of living of the affected persons, and whether the objectives of the resettlement plan have been achieved by taking into account the baseline conditions, **livelihood and**

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<sup>97</sup> Second Draft *supra* note 7 at Glossary.

<sup>98</sup> IADB SOP *supra* note 17 at Section V.D (the institutional framework for resettlement) & V.E (monitoring and evaluation); WB OP 4.12 *supra* note 10 ¶ 7 (“The process framework also includes a description of the arrangements for implementing and monitoring the process.”); World Bank, Operational Policy, BP 4.12, December 2001, ¶ 18 [hereinafter WB BP 4.12] (organizational responsibilities) & 21 (monitoring and evaluation).

**standard of living goals in the resettlement plan, any benefit sharing agreements, and the results of resettlement monitoring.”**

Recommended Edit: Insertion of binding annex analogous to World Bank OP 4.12, Annex A - Involuntary Resettlement Instrument

See World Bank OP 4.12, Annex A - Involuntary Resettlement Instrument esp. ¶¶ 18-21.

Recommended Edit: Draft Safeguard Requirements – Annex 1: Insertion of Supervisory Plan in to Model Outline of a Resettlement Plan<sup>99</sup>

**“K. Supervisory Plan**

- (i) Identification of individuals and offices within the government directly responsible for ensuring that the resettlement plan is effectively and efficiently implemented;**
- (ii) Specification of methodologies for how data will be collected, including, but not limited to, interviews with affected persons, surveys, and periodic site visits;**
- (iii) Arrangements to ensure appropriate coordination between agencies and jurisdictions involved in implementation; and**
- (iv) Any measures (including technical assistance) needed to strengthen the implementing agencies' capacity to design and carry out resettlement activities;**

**L. Monitoring and Evaluation**

- (i) Procedures for when independent monitors will be employed and their selection and supervisory mechanism(s)**
- (ii) performance monitoring indicators to measure inputs, outputs, and outcomes for resettlement activities**
- (iii) procedures for ensuring involvement of the displaced persons in the monitoring process**
- (iv) Evaluation of the impact of resettlement for a reasonable period after all resettlement and related development activities have been completed**
- (v) Using the results of resettlement monitoring to guide subsequent implementation.”**

**V. CONCLUSION**

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

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<sup>99</sup> See WB BP 4.12 *supra* note 98 at ¶ 18 (organizational responsibilities) & 21 (monitoring and evaluation).